



# Global Corporate Governance Issues for Mutual Funds

## Table of Contents

### ASIA

Survey of Corporate Governance Practices in Selected Asian Countries . . . . .	5
Hong Kong . . . . .	39
Japan . . . . .	55
South Korea . . . . .	69
Taiwan . . . . .	87

### EUROPE

Survey of Corporate Governance Practices in Selected European Countries . . . . .	103
France . . . . .	137
Germany . . . . .	163
Italy . . . . .	175

### LATIN AMERICA & AFRICA

Survey of Corporate Governance Practices in Selected Latin American and African Countries . . . . .	191
Brazil . . . . .	227
Chile . . . . .	243
Mexico . . . . .	261
South Africa . . . . .	277

## **BACKGROUND**

Investors increasingly are looking beyond national borders to diversify their mutual fund portfolios. Today, US mutual funds with a global or international focus account for more than 10% of the US fund industry. More than 1,100 US funds, with aggregate assets in excess of \$608 billion, invest outside the US. For most of these funds, equity investments represent a significant portion of their portfolios. In 1991, over \$39 billion of US fund assets were invested in foreign equity securities. By 1999, investments in foreign equity securities were in excess of \$607 billion.

Foreign regulations and practices can affect the ability of US funds to maximize shareholder value with respect to foreign investments. Mutual funds typically invest in foreign securities as minority shareholders. As a result, the corporate governance practices of portfolio companies in foreign jurisdictions, and the extent to which the laws and practices of foreign jurisdictions protect the rights of minority shareholders, are important considerations in making foreign investments. Of particular concern are regulations and practices in some countries that permit control shareholders to sell their shares at a premium not shared by minority shareholders, to disenfranchise unilaterally minority shareholders, or to take actions that lessen the value of the minority shares.

Mutual funds face two significant challenges in investing in foreign issuers: (1) funds may be unfamiliar with the practices and policies regarding corporate governance in another country and find it difficult to obtain information to exercise their shareholder rights and (2) the laws and regulations of a country may not provide an adequate level of shareholder protection.

## **SURVEY OF GLOBAL CORPORATE GOVERNANCE PRACTICES: KEY ISSUES**

As a first step in understanding the issues of corporate governance and shareholder rights in foreign countries, the Investment Company Institute conducted a survey of the legal, regulatory, and practical framework of corporate governance in key jurisdictions. While the survey allows a comparison of the strengths and weaknesses of corporate governance systems in different jurisdictions, the survey is not intended to suggest that a mutual fund should avoid investing in a market because of the corporate governance practices of the particular jurisdiction. Ultimately, the appropriateness of a foreign equity security as a portfolio investment is within the purview of the portfolio manager and the fund's board of directors, taking into consideration the investment and risk policies of the fund.

The survey provides information on the corporate governance systems in 11 jurisdictions. The information covers rights to vote and to attend meetings, rights of minority shareholders in corporate transactions, procedures for payment of dividends, restrictions on affiliated transactions, the role of local regulators and stock exchanges in enforcing shareholder rights, and the disclosure of financial information. In cataloging this information, the survey also indicates areas that may raise particular concerns for mutual funds.

The key areas of concern are highlighted below.

**1. Procedural Impediments to Exercising Voting Rights.** Shareholders may face cumbersome procedural requirements to vote their shares. For example, some foreign companies require a shareholder or its representative to vote in person, prohibit voting by mail, only permit a proxy to be delegated to another shareholder, or limit the ability of shares to be transferred before the shareholders meeting.

**2. Failure of Legal Framework to Assure Minimum Level of Shareholders Rights.** In certain jurisdictions, although the laws may recognize principles of corporate governance, they do not assure a minimum level of protection for shareholders in that companies may restrict broadly the rights of shareholders. For example, although most countries accept the principle of one share, one vote, some countries permit companies to limit or withdraw voting rights of certain shareholders in their organizational documents or by a resolution at shareholders meetings.

**3. Restrictions on Voting Rights.** There may be significant restrictions on the ability of shareholders to exercise their voting rights, including limitation on the amount of shares that may be voted after the shareholder owns more than a certain percentage of shares outstanding, limitation on shareholders to one vote regardless of the amount of shares owned if voting is by show of hands, or prohibition on proxies to vote by show of hands.

## COUNTRY MATRICES AND SUMMARIES

This survey summarizes the corporate governance framework in 11 jurisdictions in Africa, Asia, Europe, and Latin America. Part I of this survey is a matrix providing corporate governance information in a question and answer format. Part II of this survey provides a memorandum for each country providing a more detailed discussion of the information provided in the matrix. The matrices and individual country summaries are designed to identify the most important elements of a country's corporate governance system. The selected jurisdictions covered in this survey are as follows:

Asia	Europe	Latin America & Africa
Hong Kong	France	Brazil
Japan	Germany	Chile
South Korea	Italy	Mexico
Taiwan		South Africa





Asia

ASIA

# Survey of Corporate Governance Practices in Selected Asian Countries

## I. Rights of Shareholders

	Hong Kong	Japan	South Korea	Taiwan
A. Share Ownership:				
<i>Can companies issue classes of stock with different rights?</i>	Yes.	Yes.	Yes.	Yes.
B. Voting Rights of Shareholders:				
<i>a. Can shares have unequal voting rights?</i>	Shares of the same class must have the same voting rights; classes of stock are permitted to be non-voting. Voting rights are based on the general one share, one vote rule.	Shares of the same class must have the same voting rights; non-voting or limited voting shares are permissible. Voting rights are based on the general one share, one vote rule.	Shares of the same class have the same voting rights. Voting rights are based on the general one share, one vote rule; however, preferred stock generally does not have voting rights.	Shares of the same class must have the same voting rights. Common stock must receive one vote for each share; however, voting rights are restricted where the shareholder holds 3% or more of the total shares issued. The law requires that votes in excess of 3% be discounted; the exact percentage is set in the corporate articles. Special stock can have restricted or no voting rights.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>b. May voting rights be altered, and under what scenarios?</i>	Voting rights initially may be limited by the corporate articles or may be altered by shareholder vote at a meeting.	Voting rights of a class of shares cannot be altered except with shareholder approval.	Generally, voting rights may not be altered without shareholder approval. However, shareholder rights may be suspended under certain circumstances. See South Korea Tab, Section I.B.	Voting rights of a class cannot be altered. Shares of special stock with no voting rights may be converted into shares of common stock with voting rights if permitted in the corporate articles.
<i>c. Are there circumstances under which non-voting shares may be voted? What are the requirements for calling a meeting of non-voting shares?</i>	Generally, non-voting shares may not vote. However, in some cases non-voting shares may have a limited right to vote on certain resolutions if the rights of non-voting shareholders would be affected. See Hong Kong Tab, Section I.B. The quorum and voting requirements for a meeting of non-voting shares and any minimum shareholding requirements to call a meeting of non-voting shares usually are contained in a company's corporate articles.	Non-voting shares have the right to vote if: (i) the preferential dividend will not be paid; (ii) the articles will be amended to require board approval for the transfer of shares; (iii) the company will be changed into a private company; or (iv) if the rights of the shares are affected. The quorum requirement for a meeting of non-voting shares is 50% of the affected class. For minimum shareholding requirements to call a meeting of non-voting shares, see Japan Tab, Section I.B.	Non-voting preferred shares are entitled to vote following a resolution by shareholders not to pay preferred holders their specified dividend. Non-voting preferred shareholders do <u>not</u> have the right to vote at a shareholders meeting on a matter that may affect the rights of the non-voting preferred shareholders.	Non-voting shares have the right to vote where the company proposes an amendment to its articles that would affect adversely the rights of those shareholders. The quorum requirements for a meeting of non-voting shareholders are the same as for a meeting of common shareholders. A meeting of non-voting shareholders could be called by the board or requested by a shareholder holding 3% of the issued shares for at least one year.
<i>d. Is cumulative voting permissible?</i>	No.	Yes.	Yes. For the election of directors.	Yes.



	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>e. Are the rights of foreign shareholders subject to restrictions that do not apply to domestic investors?</i>	No. Except that investment may be restricted in certain regulated industries.	No. Except that investment may be restricted in certain regulated industries.	No. Except that certain official acts may restrict foreign ownership and voting rights.	No. Except that foreign investors are subject to restrictions on the amount of shares they can purchase. Some purchases and subsequent transfers require government approval. See Taiwan Tab, Section I.B.
C.1. Shareholders Meetings — Record Dates:				
<i>a. Are record dates used to determine rights to vote at a shareholders meeting?</i>	No. Persons that are registered shareholders at the time of the shareholders meeting are entitled to vote. However, record dates are used to determine shareholders entitled to receive dividends or to participate in rights offerings.	Record dates are used by most companies in Japan. They may close their register of shareholders prior to a shareholders meeting, and only shareholders listed in the register on that date are permitted to attend and vote at the meeting. The closure date can be up to three months before a meeting. See Japan Tab, Section I.C.1.	Yes. Record dates are used in conjunction with a shareholder register closing system to determine shareholder ownership rights at a meeting.  Once the shareholder register for a company is closed, new entries cannot be made to the register, and voting rights are limited to those persons listed in the shareholder register. The shareholder register cannot be closed for more than three months per year; in practice, it often is closed for one month.	Yes. Registration as a shareholder on the books of the company or the surrender of bearer shares to the company is required at a certain date prior to a shareholders meeting. The shareholder roster is closed one month prior to the annual shareholders meeting and 15 days prior to a special shareholders meeting. The registered owner on the roster is the shareholder for attending the meeting and voting. Bearer shares must be surrendered to the company five days before the meeting.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>b. May shares of a company be traded freely after the record date and prior to a shareholders meeting? If not, what restrictions would apply?</i>	N.A.	Yes. Shares can be traded freely after the record date, but the new owner cannot be added to the register of shareholders. The new owner would not have any rights against the company.	Yes. Shares in bearer form or deposited with the Korean Securities Depository can be traded freely after the record date, but the new owner cannot vote at the shareholders meeting. Non-bearer shares cannot be traded.	Yes. Shares may be transferred after the shareholder roster is closed, but the new owner cannot be registered on the roster and cannot attend or vote at the meeting.
<i>c. If the meeting is adjourned, is trading restricted until the next meeting?</i>	No.	No. But only the attendees of the original meeting can attend and vote at the second meeting.	No.	No. But the roster may be closed.
C.2. Shareholders Meetings – Notice Requirements:				
<i>a. What notice of shareholders meetings is required to be given?</i>	Notice must be published in at least one English-language and at least one Chinese-language newspaper (circulating daily in Hong Kong) and must be mailed to each shareholder.	Notice must be delivered to each shareholder at the registered address of the shareholder, unless all of the shareholders consent to waive the notice requirement.	Generally, notice must be made to shareholders by mail prior to all shareholders meetings. In some instances, notice by publication is permitted.	Notice of shareholders meetings is required to be given to the shareholders. Notice must be published for holders of bearer shares and mailed to registered shareholders.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>b. Are there any general or special requirements for giving notice?</i>	At least 21 days' notice must be given to shareholders for annual meetings or meetings called for passage of a special resolution. At least 14 days' notice is required for ordinary meetings.	Notice must be provided to each shareholder at least two weeks before a shareholders meeting.	Notice must be provided at least two weeks before a shareholders meeting.	<p>Notice must be given to shareholders holding registered shares 20 days in advance of an annual shareholders meeting. For bearer shares, notice must be published 30 days in advance of the annual shareholders meeting. For special shareholders meetings, notice must be given ten days in advance to registered shareholders and published fifteen days in advance for shareholders holding bearer shares.</p> <p>A handbook, containing information on each proposed resolution, must be delivered to shareholders at least eight days before a meeting.</p>
<i>c. Must the entire agenda and date and location of the meeting be identified?</i>	Yes.	Yes.	Yes.	The agenda must be in the notice. Although not required by law, the notice generally states the date and location of the meeting.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>d. Can an item be added onto the agenda for a shareholders meeting without notice being given to shareholders?</i>	No.	No. Unless all of the shareholders consent.	No. Unless all shareholders attend the meeting and unanimously consent to vote on the item.	Yes. An item can be added to the agenda at the meeting except for: reelection of directors or supervisors; amendment of corporate articles; and dissolution or merger of the company. These items must be listed in the agenda and cannot be proposed at the shareholders meeting.
C.3. Shareholders Meetings – Shareholder Proposals:				
<i>a. Can a shareholder submit a proposal for the agenda of a shareholders meeting? What are the procedural or substantive limitations?</i>	Yes. Shareholders holding not less than 5% of the total voting rights may propose a resolution, if the proposal is submitted to the company at least six weeks prior to the meeting.	Yes. Shareholders holding at least 1% of the total number of issued shares, or 300 shares/units, for at least the last six months may ask the board of directors to add a proposal to the agenda six weeks before a meeting.	Yes. Shareholders holding an aggregate of 3% of the company's voting stock may submit a proposal to the board of directors for inclusion on the agenda. For Korean Stock Exchange (KSE)-listed or KOSDAQ-registered companies, the minimum holding percentage is lower. Proposals should be submitted in writing six weeks prior to the meeting.	No. Shareholders do not have the right to add an item to the agenda. However, shareholders can make proposals during the meeting, except for reelection of directors or supervisors, amendment of the articles, or dissolution or merger of the company.



	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>b. Can a shareholder call a special meeting of shareholders?</i>	Yes. Shareholders holding at least 5% of the voting shares of a company (or a subset thereof that represents at least 51% of the total voting rights of these shareholders) may convene a meeting only after the board of directors has failed to convene a meeting, within prescribed time limits, after being requested to do so by the shareholders. See Hong Kong Tab, Section I.C.3.	Yes. Shareholders holding at least 3% of the total number of issued shares for at least the last 6 months can demand that the board of directors call an extraordinary shareholders meeting. The request must be filed in writing and state the reason for the meeting. If not convened by the board, shareholders can apply to a court for permission to convene the meeting.	Yes. Shareholders holding an aggregate minimum of 3% of the company's voting stock may call a special meeting. For KSE-listed or KOSDAQ-registered companies, the minimum holding requirement is lower.	Yes. Shareholders holding at least 3% of the total shares of the company for at least one year may ask the board of directors to convene a special shareholders meeting. The request must be in writing and must state the agenda and purpose for such special meeting. If the board does not give notice of the meeting within 15 days, the shareholders can ask the regulatory agency for approval to convene a shareholders meeting.
<i>c. Can a shareholder propose to nominate a candidate to the board of directors or remove a director?</i>	Yes. Shareholders holding an aggregate of 5% of the shares entitled to vote may propose the nomination of a director or the removal of a director.	Yes. Shareholders can propose to nominate a candidate to the board of directors or to remove a director in accordance with the procedures in Block C.3.a.	Yes. Shareholders may propose the nomination or removal of a director by exercising their right to submit a proposal or call a special meeting.	Shareholders can propose to remove a candidate from the board of directors at a shareholders meeting.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
C.4. Shareholders Meetings — Proof of Shareholder Status:				
<i>a. What are the requirements to be a legally recognized shareholder for the purpose of voting at a shareholders meeting?</i>	Shareholders must be registered in the company's shareholder registry on the date of the shareholders meeting (although in practice, companies use a "cut-off time" of the close of business on the last trading day prior to the meeting).	Shareholders must be listed in the company's shareholder register on the record date.	Shareholders must be registered in the company's shareholder register on the record date.	Shareholders must be named on the shareholder roster one month before an annual meeting and 15 days before a special shareholders meeting. Shareholders holding bearer shares must submit the share certificates to the company five days in advance of a meeting.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<p><i>b. Often shares are held in the name of a nominee (such as a broker or custodian) although owned by another person (the beneficial owner). Can shares be held in the name of a nominee, yet still be voted by the beneficial owner?</i></p>	<p>No. Unless the beneficial owner acts as a proxy for the registered shareholder.</p>	<p>No. Only registered shareholders can attend shareholders meetings. However, where shares are deposited with a depository under the central clearing system of Japan, the registered owner does have the right to attend meetings and vote the shares. Also, a registered shareholder could appoint the beneficial owner of the shares as its proxy; however, the corporate articles often require that only another registered shareholder may serve as proxy. See Japan Tab, Section I.C.4.</p>	<p>No. Only registered shareholders may vote the shares. However, if shares are registered in the name of the Korea Securities Depository (KSD) for the benefit of a shareholder, the shareholder may vote those shares. Also, the registered shareholder could appoint the beneficial owner of the shares as its proxy.</p>	<p>No. Unless the beneficial owner obtains possession of the bearer certificates or acts as a proxy of the registered owner.</p>

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>c. If shares are held in the name of a custodian or other nominee, could the custodian vote some shares in favor of a proposal for one beneficial owner and other shares against the same proposal for another beneficial owner?</i>	Yes.	Yes. However, if the broker, custodian, or other nominee is acting on behalf of more than one beneficial shareholder and intends to vote its shares differently on behalf of different shareholders, the broker, custodian, or other nominee must give three days' written notice to the company.	N.A. Shares may not be held in the name of a nominee.	If shares are held in the name of the custodian, the custodian must vote all shares of all beneficial owners for or against the proposal in the aggregate. However, if the shares are registered with the custodian listed as "co-owner," the beneficial owners (co-owners) may delegate voting authority to the custodian, and the custodian may vote as proxy some shares in favor of the proposal and some shares against the proposal.
C.5. Shareholders Meetings — Attendance at Shareholders Meetings:				
<i>a. Can a shareholder (of record or beneficial) attend annual or special meetings? What restrictions apply?</i>	Technically, only a record owner, the owner's proxy, or a corporate representative may attend meetings. However, in practice, a beneficial owner usually will not be precluded from attending meetings.	Generally, only registered shareholders can attend shareholders meetings.	Generally, only registered shareholders (or their proxies) can attend shareholders meetings. However, in practice, companies do not restrict beneficial owners from attending meetings.	Only a listed owner of registered voting shares or the entity with physical possession of bearer shares is entitled to attend a shareholders meeting and vote the shares.



	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>b. What documents are required to attend the meeting?</i>	Shareholders must provide proof of identity. Representatives of corporate entities may be required by the corporate articles to bring notarized documentation evidencing authority to vote to the company 48 hours before the meeting. Proxy holders should provide evidence of the delegation of proxy. See Block C.6.d.	Shareholders must provide proof of identity. In general, Japanese companies send an attendance card with the notice of a shareholders meeting. Corporate shareholders can send their officers and employees to attend shareholders meetings with a document showing their authority to act for the company. Any proxy of the shareholder attending the meeting would have to bring a written proxy.	Shareholders must provide proof of identity. Most companies distribute an attendance card that may be used as proof of identity. Representatives of corporate shareholders must bring a form of identification proving the representative's position with the company and a power of attorney granting the representative authority to vote. Proxy holders also must provide the proxy.	In practice, a corporation will send a notice and a form to a registered shareholder; the completed form must be returned to the company in exchange for a pass. Bearer shares are surrendered to the company. The individual shareholder only need bring identification and the pass to attend the shareholders meeting. For representatives of corporate shareholders, the shareholder should mail a letter of designation and a copy of the identification of the representative to the company prior to the meeting. Proxy holders also must provide the proxy.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>c. May a shareholder ask questions at the meeting? May a shareholder bring a translator to the meeting?</i>	<p>Yes. Shareholders may ask questions, but cannot raise any matter that is outside the scope of the meeting's agenda.</p> <p>There is no specific rule regarding translator attendance at meetings, but in practice a shareholder obtains prior permission from the company before bringing one.</p>	<p>Yes. Shareholders may ask questions.</p> <p>A shareholder can request permission to bring a translator, which can be granted or denied by the chairman of the meeting.</p>	<p>No specific law addresses this issue, but it is the general practice that shareholders are free to ask questions.</p> <p>No specific rules address a shareholder's ability to be accompanied by a translator.</p>	<p>Yes. Shareholders may ask questions at meetings. However, rules of the meeting may require shareholders to fill out a form prior to stating the question.</p> <p>A shareholder can bring a translator to the meeting.</p>
C.6. Shareholders Meetings – Proxy Voting:				
<i>a. Can shareholders vote by form of proxy at a shareholders meeting? What are the restrictions or requirements?</i>	<p>A shareholder can appoint the chairman of the meeting as its proxy by mailing in the proxy form, or the shareholder or its proxy may attend the meeting.</p> <p>A proxy may not vote when votes are counted by a show of hands, as opposed to a poll vote. See Block I.C.6.e.</p>	<p>Only shareholders of large companies having a stated capital of at least 500 million yen, or total liabilities of at least 20 billion yen, with at least 1,000 shareholders can vote by mail. The notice to convene a shareholders meeting for these large companies will include a voting form for this purpose.</p>	<p>There is no procedure for casting votes by mailing in a proxy form, but shareholders may do so if authorized by the corporate articles.</p>	<p>Voting by mail is not permitted; the shareholder or its proxy must attend the meeting. A shareholder can appoint company management as proxy with or without specific voting instructions. Except for trust companies, if the proxy holds more than 3% of the total shares issued, votes in excess of 3% will not be counted.</p>

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>b. May shareholders delegate authority to another person to act as proxy?</i>	Yes. Shareholders may delegate voting authority to a representative.	Yes. Shareholders may delegate voting authority to a representative. However, many companies specify in their corporate articles that a proxy must be another shareholder.	Yes. Shareholders may delegate voting authority to a representative.	Yes. Shareholders may delegate voting authority to a representative.
<i>c. May delegates of a shareholder vote in person or by proxy?</i>	The shareholder's proxy must attend the meeting and vote in person.	The shareholder's proxy must attend the meeting and vote in person.	The shareholder's proxy must attend the meeting and vote in person.	The shareholder's proxy must attend the meeting and vote in person.
<i>d. What are the general requirements for delegating voting authority to a person to act as proxy?</i>	The corporate articles specify the requirements for designating a proxy. Typically, proof of power of attorney is required.	The proxy should be in the form of a power of attorney and must be presented no later than the time of the shareholders meeting. It is advisable to submit the documentation prior to the meeting to permit the company to verify it. It should be translated into Japanese if it is in a language that would not be readily understood.	Written proof of power of attorney should be submitted at the meeting.	The proxy must be in writing and state the scope of authority.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>e. What general limitations exist for a person who is acting as a proxy? Can a proxy vote in favor of a proposal for one shareholder and against the same proposal for another shareholder?</i>	Unless stated otherwise in the corporate articles, (i) a shareholder may not appoint more than two proxies to attend a meeting, and (ii) a proxy may not vote when votes are counted by a show of hands, as opposed to a poll vote. However, a proxy (including a broker, custodian, or other nominee serving as proxy) may vote on behalf of more than one shareholder and may vote in favor of a proposal for one shareholder and against the same proposal for another shareholder.	A shareholder may not be able to appoint more than one proxy to attend the same shareholders meeting. However, a proxy (including a broker, custodian, or other nominee serving as proxy) may vote on behalf of more than one shareholder and may vote in favor of a proposal for one shareholder and against the same proposal for another shareholder. A nominee serving as proxy for more than one shareholder and intending to vote shares differently on the same proposal must give the company three days' written notice.	There are no general restrictions, but companies may limit proxies in their corporate articles. A proxy (including a broker, custodian, or other nominee serving as proxy) may vote on behalf of more than one shareholder and may vote in favor of a proposal for one shareholder and against the same proposal for another shareholder.	One shareholder only can issue one proxy and authorize one person/entity to be the proxy. However, a proxy may vote on behalf of more than one shareholder and may vote in favor of a proposal for one shareholder and against the same proposal for another shareholder.



	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
C.7. Shareholders Meetings – Quorum:				
<i>What are the requirements for determining if a quorum has been obtained?</i>	Unless stated otherwise in the corporate articles, two shareholders present at a meeting constitute a quorum.	A quorum generally is more than 50% of the outstanding shares of a company. Most companies have reduced the quorum in their corporate articles. However, for appointing directors or auditors, the quorum cannot be less than one-third of the total number of issued shares. The number is counted when shareholders enter the meeting.	There is no requirement for a quorum to conduct business at shareholders meetings.	The quorum ranges from 50% to 75% of the total number of voting shares, depending on the nature of the action to be taken. See Taiwan Tab, Section I.C.7. The quorum is determined by a signature book or by signature cards.
C.8. Shareholders Meetings – Voting and Supermajority Provisions:				
<i>a. How does a shareholder vote shares?</i>	Shareholders can attend the meeting in person or designate a proxy, who must attend in person. Corporate shareholders may designate a corporate representative to attend the meeting on its behalf.	Shareholders can vote shares in person or by proxy. For certain large companies with more than 1,000 shareholders, shareholders are permitted to vote in writing. See Japan Tab, Section I.C.8.	Shareholders or their representative proxies generally attend meetings in person to vote their shares.	Shareholders can vote shares only in person or by proxy, who must attend in person.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>b. What are the general requirements for voting for a measure to be adopted?</i>	Ordinary resolutions are adopted by a simple majority of the votes cast at the meeting. Special resolutions are adopted by 3/4 of the votes entitled to be cast.	Most measures can be adopted by a simple majority of shares voting at a shareholders meeting.	Ordinary resolutions are adopted by a simple majority of the shares present at the meeting (which must represent a minimum of 1/4 of all issued and outstanding shares). Special resolutions are adopted by 2/3 of the shares present at the meeting (which must represent a minimum of 1/3 of all issued and outstanding shares).	Most measures can be adopted by a simple majority of shareholders present and voting at a meeting, except for dissolution or merger. See Taiwan Tab, Section I.C.8.
<i>c. Can a company adopt higher (supermajority) voting measures?</i>	No.	Yes. The corporate articles can provide for higher voting/quorum requirements.	Yes. The corporate articles can provide for higher voting requirements.	Yes. The corporate articles can provide for higher voting/quorum requirements than set out in the statute.
<i>d. Are supermajority voting requirements required by law?</i>	Yes. Special resolutions, requiring 3/4 of the votes entitled to vote, are required for certain issues.	Yes. A 2/3 majority of the voting stock present at a meeting is required to pass certain resolutions, including: an increase in the number of shares authorized to be issued; the removal of a director or auditor; dissolution, merger, or consolidation of the company; and the transfer of the whole or an essential part of the business. See Japan Tab, Section I.C.8.	Yes. Measures that materially alter the company must be adopted by special resolution of 2/3 of the votes present at the meeting (representing a minimum of 1/3 of all issued and outstanding voting shares).	Most measures can be passed by a simple majority. However, for large companies subject to the Taiwanese securities laws, a 75% vote is required for dissolution or merger. See Taiwan Tab, Section I.C.8.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
C.9. Shareholders Meetings – Voting Tabulations and Results of Shareholders Meetings:				
<i>a. What general mechanisms apply in counting votes?</i>	In practice, votes are counted by a show of hands at the meeting, but shareholders may request a poll vote.	Unless specified in the corporate articles, the chairman of the meeting can adopt almost any method of voting, so long as the result of the voting can be confirmed clearly.	The method for counting votes may be established in the corporate articles and is not addressed by a specific law. Voting may be conducted by a standing vote, a show of hands, or other method determined by the chairman of the meeting.	The articles specify the method to count votes. For companies subject to the securities laws, the chairman of the meeting appoints personnel to supervise or count votes and then announces the result.
<i>b. Is management of a company required to tabulate the votes?</i>	No.	No.	Yes. The meeting chairman has the duty to tabulate votes.	No.
<i>c. May foreign investors call for a tabulation? What limitations apply?</i>	No. Unless the corporate articles provide otherwise, no investor (foreign or domestic) can call for a tabulation.	Yes. Any shareholder can request a formal vote count, but the chairman of the meeting may refuse this request at his discretion.	Yes. Any shareholder that was present at the meeting, or the shareholder's agent, may call for tabulation.	No.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>d. What are the requirements regarding the verification of votes of a shareholders meeting?</i>	Unless the corporate articles provide otherwise, there are no requirements for verification of votes. In practice, the chairman appoints someone to oversee the voting process.	There are no requirements for verification of votes. However, a shareholder holding at least 1% of the total number of issued shares for the prior six months can request a court to appoint an inspector in advance of a shareholders meeting.	There are no requirements for verification of votes.	There are no requirements for verification of votes.
<i>e. What information is made available to shareholders regarding the results of a shareholders meeting?</i>	Minutes must be prepared for each meeting. Shareholders have the right to obtain access to the minutes of ordinary meetings. No other information is required to be made available to shareholders.	Minutes of every meeting must be recorded and must contain the substance of the course of the proceedings and the results thereof. Shareholders can inspect the minutes, proxy documents, and other voting documents at the company's offices.	The minutes contain a record of the resolution proceedings and their results, and the Chairman and directors present at the meeting must either sign or place their seal on the minutes. The minutes are maintained at the company's headquarters and branches, and shareholders may inspect or make copies of the minutes.	Resolutions and vote results are recorded in the minutes and signed by the chairman. Companies also must video or audio tape shareholders meetings and preserve the record for one year. The minutes are distributed to shareholders within 15 days after the meeting.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
D. Rights of Minority Shareholders in Corporate Transactions:				
<i>a. What rights does a minority shareholder have in a corporate transaction (such as a merger, a takeover, privatization, etc.)?</i>	<p>Shareholders that have a material interest in certain transactions (as defined by the stock exchange rules) are precluded from voting on the resolution to approve the transaction.</p> <p>75% of minority shareholders must approve a company's withdrawal of its listing on the stock exchange.</p> <p>In the case of a stock buy-back by the company, shareholders that give the required notice are not obligated to sell their shares.</p>	<p>For certain major corporate transactions, a 2/3 majority of the shares represented at a shareholders meeting is required to approve the transaction. For certain transactions where a dissenting shareholder expresses dissent in writing to the company before the shareholders meeting and votes against the transaction during the meeting, the dissenting shareholder can force the company to redeem its shares. The share price would be the fair value of the shares but for the resolution from which the shareholder dissented. See Japan Tab, Section I.D.</p>	<p>Dissenting shareholders have appraisal rights for certain matters subject to special resolution, such as a short-form merger.</p>	<p>For certain major corporate transactions, a shareholder expressing dissent both before and during the meeting can force the company to redeem its shares at fair market value. Shareholders dissenting to a merger transaction can waive their right to vote at the meeting in exchange for redemption. See Taiwan Tab, Section I.D.</p>

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>b. Can shares be subject to mandatory redemption or sale? How is the share price determined?</i>	Yes. An acquiring company in a takeover can acquire a minority shareholder's shares if the acquiring company has acquired 90% of the company's shares. The share price is the same as the offer price in the takeover. Shares also may be subject to mandatory redemption in connection with a share repurchase offer. See Hong Kong Tab, Section I.D.	No.	Yes. Share price is determined through negotiation between the shareholder and the company or through an accounting professional. In certain instances, the court may determine the share price.	No.
<i>c. How can a minority shareholder object to actions taken by majority shareholders in a corporate transaction?</i>	In the case of a takeover, a dissenting shareholder may seek a court order to either prevent the share purchase or alter the terms of the acquisition. See Hong Kong Tab, Section I.D.	By exercising dissenter's rights as described in Block I.D.a. A record of dissenting votes and comments also is made in the minutes of the shareholders meeting. See Japan Tab, Section I.D.	A shareholder can object to actions taken by a majority shareholder or management by proposing a meeting agenda item, by exercising appraisal rights, or by seeking an injunction. See South Korea Tab, Section I.D.	Dissenting votes and comments are recorded in the minutes. A shareholder also can formally request the board to stop an action and can petition the courts to remove a director. See Taiwan Tab, Section I.D.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>d. Under what circumstances can an issuer restrict the rights of shareholders?</i>	None, except where a class is issued with restricted rights.	None, except where a class is issued with restricted rights.	In some instances, the law may specify that the rights of shareholders may be limited by the corporate articles or by other means. For example, preemptive rights may be granted to third parties or may be limited by a reorganization plan approved by the court.	None, except where a class is issued with restricted rights.
E. Transferability of Shares:				
<i>Are there any limitations on the ability of a minority or foreign shareholder to sell or transfer shares?</i>	No. There are no such specific limitations, although they can be imposed by the corporate articles.	No. Corporations generally cannot restrict the transfer of securities. However, unlisted companies may require the approval of the board of directors for share transfers.	No. There are no such specific limitations, although share transfers may be restricted by the corporate articles subject to limitations in the Code. However, trading by foreigners of shares listed on the KSE or the KOSDAQ must occur on the KSE or the KOSDAQ.	No. Generally, shares of listed companies can be transferred freely on the stock markets. However, foreign shareholders that are subject to quantity restrictions on purchasing shares also are restricted in selling shares and may need to obtain government approval. Taiwan Tab, Section I.E.



	Hong Kong	Japan	South Korea	Taiwan
F. Accounting:				
<i>Under what circumstances can a shareholder seek an accounting of the issuer?</i>	Shareholders generally have no right to request an accounting.	Shareholders holding at least 10% of the total number of issued shares can demand to inspect or make copies of the books and records of a company.	All shareholders have the right to request an accounting. Shareholders with certain minimum holdings may request, inspect, or make copies of the company's accounting books and documents.	Shareholders holding at least 3% of the total number of issued shares for at least one year can ask the courts to appoint an inspector to inspect the business and accounts of a company.
G. Inspection Rights:				
<i>Do shareholders have inspection rights (such as to review a company's share register, minutes of meetings, financial statements and other documents)?</i>	Yes. Shareholders have the right to inspect the company's shareholder registry book and the minutes of any ordinary shareholders meeting. Shareholders also can obtain a copy of the corporate articles.	Yes. Shareholders can review the following documents at the company's offices during business hours: the register of shareholders, minutes of meetings, corporate articles, and financial statements.	Yes. Shareholders may inspect and make copies of the company's corporate articles, meeting minutes, shareholder registry, and bond registry. Shareholders also may inspect the financial statements, annual report, and audit reports.	Shareholders can review most documents, including records of accounts, business reports, balance sheets, cash flow statements, and minutes at the company's offices.

## II. Payments of Dividends

	Hong Kong	Japan	South Korea	Taiwan
<i>a. Do companies publicly announce the payment of a dividend?</i>	Yes. Companies must announce the payment of a dividend in an English and Chinese newspaper.	No. Except for listed companies.	Yes. The dividend record date must be publicly announced at least two weeks in advance, unless specified by the corporate articles.	No. Public disclosure of a dividend is not required. Large companies subject to the Taiwanese securities laws are required to report the substance of a shareholders meeting to the relevant agency. The amount of the dividend is determined by the shareholders.
<i>b. Are dividend distributions mandatory or discretionary?</i>	Usually discretionary, subject to the provisions of the corporate articles.	Dividend distributions are discretionary. They are declared by the board of directors and approved at a shareholders meeting.	Dividend distributions are discretionary.	Dividend distributions are discretionary. They are declared by the shareholders at the shareholders meeting.
<i>c. Are different dividend payments permitted for foreign and domestic shareholders or majority and minority shareholders?</i>	No. Shares of the same class must have the same dividend rights. Classes of shares with enhanced distribution rights are permitted.	No.	No. Shares of the same class must have the same dividend rights. Classes of shares with enhanced distribution rights are permitted.	No.
<i>d. Are cumulative dividends permitted (where preferred stock gets past-due dividends before common-stock dividends get paid)?</i>	Yes.	Yes.	Yes. Cumulative dividends are permitted in accordance with the cumulative distribution prescribed in the corporate articles.	Yes.
<i>e. Are dividends payable only in local currency?</i>	Yes.	Yes.	No.	Yes.

### III. Affiliated Transactions

	Hong Kong	Japan	South Korea	Taiwan
<i>a. Are there restrictions on transactions by a company with its affiliates, including employees?</i>	Yes. See Hong Kong Tab, Section III.	Certain transactions with directors and other companies affiliated with those directors require the approval of the board of directors.	The board of directors must approve direct or indirect transactions between directors and the company, but there are no restrictions on transactions between officers or other employees and the company.	Shareholders with a personal interest in company business cannot vote on that business. Other transactions with related persons must be disclosed in financial statements.
<i>b. Are there restrictions on an officer or director owning more than a certain percentage of stock?</i>	No. Unless the corporate articles provide otherwise. However, the stock exchange rules require certain percentages of a company's shares to be in "public hands." See Hong Kong Tab, Section III.	No.	No. However, they may be liable for short-swing profits.	No. Not when purchasing from the market or a third party, but a company may be restricted in issuing shares to officers and directors. See Taiwan Tab, Section III.
<i>c. Can a company sell stock to officers, directors, or employees at a price lower than the current market price?</i>	Yes.	Yes. With the approval of 2/3 of the shares represented at a shareholders meeting.	No.	No. Only newly issued shares can be sold to directors, officers, or employees, subject to the pre-emptive rights of existing shareholders and employees. The subscription price must be the same.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>d. Are transactions with affiliates required to be disclosed to the public or regulators?</i>	No. Transactions with affiliates are disclosed at shareholders meetings, but not to the public or to regulators.	No. Except for new issues of shares to be sold to officers, directors, or employees at a price lower than market price.	Generally, no. However, an officer, director, or beneficial owner of a significant percentage of shares of a KSE-listed or KOSDAQ-registered company is required to disclose his ownership interest in the company within ten days of becoming an officer, director, or beneficial owner.	Yes. In financial statements.

## IV. Enforcement of Shareholder Rights

	Hong Kong	Japan	South Korea	Taiwan
A. Responsibility of the Board of Directors:				
<i>a. Is there a body of law that requires the board of directors to represent the interests of the shareholders of the company?</i>	No.	No. Directors have a duty only to the company, but indirectly have a duty to shareholders.	No. Directors have a duty only to the company, but indirectly have a duty to shareholders.	No. Directors have a duty only towards the company.
<i>b. Can directors be held liable for breach of fiduciary duty?</i>	Yes.	Yes.	Yes.	Yes.
B. Enforcement of Rights by Local Regulators:				
<i>a. Is there a regulatory agency or stock exchange in the country that oversees shareholder rights?</i>	Yes. The Securities and Futures Commission and the stock exchange.	No.	Yes. The Act on the Creation of Financial Supervisory Agency directs the Financial Supervisory Commission to manage and supervise the securities market and to protect investors.	No. But there is a regulatory agency that regulates public companies and indirectly protects shareholders. The local stock exchanges assist the regulatory agency.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>b. In practice, does the regulatory agency or stock exchange play an active role in enforcing rights?</i>	Yes.	Yes. The Japanese stock exchanges do oversee listed companies and oversee shareholders' rights in certain areas (such as payment of dividends). See Japan Tab, Section IV.B.	Yes. The Financial Supervisory Commission actively regulates violations of the Securities and Exchange Act, and the KSE regulates the disclosure requirements of KSE-listed companies.	No. But they are active in regulating companies.
C. Enforcement of Rights through the Judicial System:				
<i>a. What legal measures are available to shareholders if they believe their rights have been violated?</i>	A shareholder may seek relief in court and can file a complaint with the Securities and Futures Commission and/or the stock exchange.	Japanese law generally permits shareholders to seek redress through the judicial system for violation of their rights by a company. In addition, any shareholder holding a share of stock for at least the last 6 months can demand, in writing, that the company institute an action against its directors.	Shareholders that believe that their rights have been violated may seek the following measures: revocation or alteration of resolution, suspension of action, suspension of the issuance of new stock, nullification of merger, removal of directors, and request for dissolution.	Any shareholder can file a suit for a violation of the corporate articles or the law in passing a resolution, within one month after the resolution is adopted. Shareholders holding at least 5% of the total number of issued shares for at least one year also can ask the supervisor to institute an action against any director of the company.
<i>b. Must shareholders exhaust remedies with the company first?</i>	No.	In general, no.	No.	Yes. In the case of a board action violating the articles. See Taiwan Tab, IV.C.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>c. Can a minority or foreign shareholder bring a “derivative suit” against a company?</i>	Yes.	Yes. If the company does not institute the action within 30 days from the date on which the shareholder made its demand.	Yes. See South Korea Tab, Section IV.C.	Yes. To stop an action by the board harmful to the company, a shareholder of at least one year must request the board to stop, and then call for the removal of the director at the next shareholder meeting. After this, shareholders holding at least 3% of the total number of issued shares for at least one year can file a court suit.



## V. Financial Information and Auditors

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>a. Are there laws and regulations governing the preparation of financial reports?</i>	Yes. See Hong Kong Tab, Section V.	Yes. All joint stock corporations must prepare annual financial reports. Periodic financial reports also are required under the securities laws for listed companies. See Japan Tab, Section V.	Yes. See South Korea Tab, Section V.	Yes. See Taiwan Tab, Section V.
<i>b. Are such reports publicly available?</i>	Yes. Annual reports and audited accounts must be published in newspapers.	Yes. Shareholders can request copies of the documents at any time or view them at the company's offices during business hours. After the annual general meeting, public notice of the balance sheet of the company is published.	Yes. The audit and financial statements are available in the company's main office for a period of 5 years and the company's branch offices for a period of 3 years.	Yes. At the company's offices.
<i>c. Can a shareholder request such reports?</i>	Yes.	Yes.	Yes.	No. They must be viewed at the company's offices.
<i>d. Are the reports available on a timely basis?</i>	Yes. Shareholders must receive a copy of the annual report and audited accounts at least 21 days before the company's ordinary meeting.	Yes. They are available prior to the annual shareholders meeting.	Yes.	Yes. Financial statements must be available at least 10 days prior to the annual meeting.

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>e. Are there rules imposing standards on auditors?</i>	Yes. Auditors must be qualified under the Professional Accounting Ordinance and may not be an officer of the company.	Yes. Shareholders elect a statutory auditor annually. The auditor cannot be a director or employee of the company or any of its subsidiaries. In addition, for larger companies, there must be an independent certified public accountant.	Yes. The Act on External Audit of Stock Corporations requires that a qualified accounting firm perform the company's external audit and external auditors are required to submit their audit reports to the Securities Futures Commission and the Korean Institute of Certified Public Accountants.	Yes. Auditors must maintain their independence and must comply with Taiwan GAAP.

## VI. Depositary Receipts/Nominee Rights

	Hong Kong	Japan	South Korea	Taiwan
<i>a. Are holders of ADRs or GDRs recognized as the holders of the securities underlying the depositary receipt program?</i>	No.	No.	No. The depositary institution is the recognized holder of the security.	No.
<i>b. Are ADR holders permitted to vote at a shareholders meeting? What requirements apply?</i>	No. Unless the custodian appoints the holder as a proxy.	No. Unless the custodian appoints the holder as a proxy. Otherwise the ADR holder must remove the ADRs from the program, obtain share certificates, and get registered into the company's shareholders register in order to vote.	No. The depositary institution, at the direction of the beneficial owner, exercises voting rights at shareholders meetings. However, the depositary institution can appoint the holder as a proxy.	No. Unless the custodian appoints the holder as a proxy.
<i>c. Can the holders of ADRs enforce their rights against the company, or must they seek redress through the entity that put the ADR program together?</i>	No. Holders of ADRs have no rights against the company; they must enforce rights against the entity that put the ADR program together.	No. Holders of ADRs have no rights against the company; they must enforce rights against the entity that put the ADR program together.	No. Holders of ADRs have no rights against the company; they must enforce rights against the entity that put the ADR program together.	No. Holders of ADRs have no rights against the company; they must enforce rights against the entity that put the ADR program together.

## VII. Corporate Governance Codes

	<b>Hong Kong</b>	<b>Japan</b>	<b>South Korea</b>	<b>Taiwan</b>
<i>a. Has the government of your country or local stock exchange or SRO adopted a code of conduct or corporate governance code?</i>	No. Although Appendix 14 to the Hong Kong Listing Rules contains a Code of Best Practices for conducting board meetings.	No.	Yes. Several organizations, including the Korea Stock Exchange, the Korea Securities Depository, the Korea Securities Dealers Association, and the Financial Supervisory Committee have adopted Codes of Conduct.	No.



Asia

Hong Kong

# Hong Kong



This memorandum was prepared based upon information received from Deacons Graham & James of Hong Kong and addresses the law and the general corporate governance practices of companies incorporated in Hong Kong and listed on the Hong Kong Stock Exchange Limited (“Stock Exchange”) and the Growth Enterprise Market.<sup>1</sup> The information contained herein is based on the Hong Kong Code on Takeovers and Mergers (“Code”), the Companies Ordinance,<sup>2</sup> and the rules governing listed companies and is current as of July 1, 2000.<sup>3</sup>

## I. Rights of Shareholders<sup>4</sup>

### A. Share Ownership

Companies are permitted to issue different classes of shares with different voting and/or dividend rights.

### B. Voting Rights of Shareholders

A company’s Articles<sup>5</sup> state the voting rights for each class of shares. The Companies Ordinance requires that share certificates must specify the voting rights attached to each class of shares. Different classes of shares may have different voting rights, but shares of the same class may not have unequal voting rights. A company’s Articles generally specify procedures for altering voting rights and typically provide that the rights attaching to a particular class of shares may be varied either: (i) with the written consent of three-quarters (in nominal value) of the holders of the issued shares of that class; or (ii) with the sanction of a Special Resolution<sup>6</sup> passed at a separate meeting of the holders of the shares of that class.<sup>7</sup> Non-voting shares may have limited rights to vote on certain resolutions (e.g., a resolution to wind-up the company or other matter affecting the rights of non-voting shareholders). The quorum and voting requirements for a meeting of non-voting shares and any minimum shareholding requirements to call a meeting of non-voting shares are contained in a company’s Articles and may differ

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- 1 “GEM” refers to Growth Enterprise Market, a secondary board operated by the Stock Exchange created in November 1999 as an interim market for emerging enterprises.
  - 2 The term “Companies Ordinance” refers to the Hong Kong Companies Ordinance (chapter 32 of the Laws of Hong Kong).
  - 3 It should be noted that over half of the companies listed on the Hong Kong Stock Exchange are incorporated in the People’s Republic of China, Bermuda, or the Cayman Islands. Generally, the requirements of Code and the Companies Ordinance would not apply to these companies.
  - 4 Information provided in this Section is based primarily upon the Companies Ordinance.
  - 5 The term “Articles” refers to the Articles of Association of the company or their equivalent.
  - 6 Special Resolutions require a minimum of three-fourths of the shareholder votes entitled to be cast, voting in person or, where proxies are allowed, by proxy, at a general meeting for which notice has been given not less than 21 days prior to the meeting.
  - 7 Where a separate meeting is held: (a) the necessary quorum shall be at least two persons holding or representing by proxy at least one-third in nominal value of the issued shares of the class; and (b) any holder of shares of the class present in person or by proxy may demand a poll of the shareholders holding that particular class.



for each company. The Articles are required to include the words “non-voting” (and/or “restricted/limited voting”) in the designation of such shares, as is appropriate.

Shareholders of listed companies may not engage in cumulative voting.

## C. Shareholders Meetings

### 1. Record Date

Shareholders registered at the time of the meeting are entitled to vote at shareholder meetings. Record dates generally are only used when a company conducts a rights offering or passes a resolution declaring a dividend or other distribution on shares. In such an instance, the books of the company are closed prior to the annual shareholders meeting or extraordinary shareholders meeting, in accordance with the Companies Ordinance and the company’s Articles.

### 2. Notice Requirements for Shareholders Meetings

Companies are required to announce annual and special (often called extraordinary) shareholders meetings to shareholders. There is a 21-day minimum notice period for general annual meetings and meetings called for passage of a Special Resolution. All other meetings require a 14-day minimum notice period.

Companies are required to send notice of meetings to all shareholders and listed companies are required to publish meeting notices in at least one English-language and one Chinese-language newspaper. Shareholder notice typically is sent by post, although there are emergency provisions to allow a company to publish notice by way of advertisement in the English and Chinese press. Valid notice includes the date, time, and place of the meeting, as well as the purpose of the meeting. In practice, notices typically set out the proposed resolutions, particularly if the resolutions have legal implications.

There are no special notice requirements imposed on companies that have taken affirmative actions to qualify their shares for trading outside Hong Kong, by establishing American Depositary Receipt (“ADR”) or Global Depositary Receipt (“GDR”) programs. The company only is obligated to provide notice to the registered owner of shares.

### 3. Shareholder Proposals

#### a. Resolution Requirements

Under the Companies Ordinance, any number of shareholders representing, in the aggregate, not less than 5% of the total voting rights of all shareholders with voting rights, may propose a resolution for shareholder consideration. The proposal must be submitted to the company's registered office not less than six weeks before the meeting.

#### b. Meeting Requirements

The directors of a company are required to convene an extraordinary general meeting at the request of shareholders, who at the date of the request hold not less than 5% of the shares carrying the right to vote at general meetings of the company. There are no other procedural or substantive limits on the proposals shareholders may submit, except that the request must be legal and appropriate under the Articles. In order for the request to be valid, it must be delivered to the company's registered office, state the objectives of the meeting, and be signed by the requesting shareholders. If the directors do not, within 21 days from the date of such request, give notice that a meeting will be called, the requesting shareholder (or any of the group of shareholders representing more than one-half of the total voting rights of the group) may themselves convene a meeting. In certain circumstances, the court may order a meeting of the company be called.

#### c. Election and Removal of Directors

Shareholders representing in the aggregate one-twentieth of the total rights entitled to vote may nominate directors and propose that directors be removed before the expiration of their term in office by Special Resolution.

#### d. Only Registered Shareholders Have Rights

The form of the shareholder's ownership does not affect a shareholder's right to call a shareholders meeting. In order to call a meeting or submit a proposal, a shareholder must be the registered holder of the shares. Holders of depositary receipts typically are not the registered holders of their underlying shares.

### 4. Proof of Shareholder Status

Shareholders must be the registered holders of shares entitling the shareholder to vote at the time of the meeting in order to vote at a shareholders meeting. Companies generally close their books to determine the exact shareholding of the company at the close of business on the trading day immediately preceding the meeting. The form in which shares are held does not affect the ability of shareholders to vote as long as the holder of the shares is named in the company's register of members as the registered holder. The company's share registrars, with a complete list containing details as to each shareholding, will be in attendance at the meeting. Shares held in the name of a nominee,

such as a brokerage firm or a custodian, only may be voted by the nominee. A nominee would vote shares held on behalf of beneficial owners in accordance with instructions received from beneficial owners. A nominee may vote some shares in favor of a proposal for one beneficial owner and other shares against the same proposal for another beneficial owner. There is no minimal holding period required to establish ownership. Attendees at a shareholders meeting generally are only required to produce evidence of their identity and will be asked to sign in.

## 5. Attendance at Shareholders Meetings

Only the registered holder of shares is entitled to attend and vote at a shareholders meeting. Shareholders may appoint a proxy to attend and vote in their place. Similarly, a corporate shareholder may appoint a corporate representative (as described below) to attend and vote in its place. The Companies Ordinance permits a clearing house (e.g., HKSCC<sup>8</sup> Nominees) to appoint person(s) to act as its representative(s) at shareholders meetings, and to vote in accordance with the instructions it has received from various “participants” entitled to the shares to be voted at the meeting. Technically, the beneficial owner<sup>9</sup> of shares must instruct his nominee (i.e., the registered holder) to attend and vote the shares on his behalf. In practice, however, a beneficial owner of shares is unlikely to be precluded from attending the meeting. Shareholders are permitted to ask questions at the meeting, but cannot raise matters outside the scope of the agenda proposed for that particular meeting. A shareholder may, if the company agrees, bring a translator to a meeting, although there is no specific right to do so.

## 6. Proxy Voting

### a. General

Attendance at a shareholders meeting is not required. A shareholder may mail in a proxy appointing the chairman of the meeting to act as its proxy, or a shareholder may appoint a proxy or corporate representative to attend and vote in its place at the meeting. A proxy appointed by a shareholder is entitled to attend and vote at a meeting, but generally is not entitled to vote by a show of hands. A proxy may further delegate this voting right to someone with appropriate power of attorney. However, a corporate representative cannot sub-delegate and must attend the meeting in person. Foreign investors are subject to the same voting procedures and need not be represented by a local attorney or other representative in order to vote at a meeting either in person or by proxy.

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<sup>8</sup> “HKSCC” refers to the Hong Kong Securities Clearing Company Limited.

<sup>9</sup> The term “beneficial owner” refers to the owner of a security registered in another’s name (such as in the name of a broker).

### **b. Proxy Formalities**

The Articles typically contain formalities for designating a proxy. For example, the Articles may require that the instrument appointing a proxy and the power of attorney (or other authority, if any, under which it is signed) or a notarized certified copy of that power or authority be submitted to the company not less than 48 hours before the meeting. If the power of attorney (or other authority) is not written in English or Chinese, it will in practice need to be translated into either language. The Listing Rules<sup>10</sup> require a company to send (with the notice convening a shareholders meeting) to all persons entitled to vote at the meeting, proxy forms with provision for voting on all resolutions intended to be proposed at the meeting.

### **c. Corporate Representatives**

The Articles generally set out the procedures for a corporate shareholder to vote through a corporate representative. As required by the Companies Ordinance, the Articles may specify that certain notarized documentation be submitted to the company 48 hours prior to the meeting (e.g., a copy of the resolution authorizing the appointment, the company's founding documents, and a list of the directors as of the date of the resolution). In practice, this documentation will need to be translated into English or Chinese if the originals are in another language. A corporate representative is not required to be an officer or employee of the company, but must be appointed properly to act as a representative in accordance with the company's Articles.

### **d. Limitations**

Unless the Articles provide otherwise, a proxy may not vote on a show of hands, and a shareholder may not appoint more than two proxies. The Articles usually will require that every instrument of proxy be in a form approved by the board of directors. A proxy can act on behalf of more than one shareholder. It is typical for the chairman of the company to be appointed by shareholders as their proxy to vote in a particular manner. A proxy (including a custodian or other nominee) may, where he is acting on behalf of more than one shareholder, vote in favor of a proposal on behalf of one client and against that same proposal on behalf of another client. A corporate representative has the same powers as his appointing shareholder.

## **7. Quorum**

The Companies Ordinance provides that unless the Articles require a greater number, two shareholders personally present shall be a quorum for a shareholders meeting. In practice, the Articles typically only require two persons to be present. There are no specific procedural requirements for determining whether a quorum has been obtained at a meeting, other than counting the number of

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10 The term "Listing Rules" refers to the Rules Governing the Listing of Securities on Stock Exchange.

shareholders present before the meeting proceeds to business. If a meeting is adjourned for failure to meet a quorum, the Articles typically provide that the chairman will call another meeting between seven and 28 days of the meeting's adjournment.

## 8. Voting and Supermajority Provisions

Measures are generally adopted by a simple majority (*i.e.*, greater than 50%) of the shares voting, unless the Companies Ordinance or the Articles requires a higher voting measure. The Companies Ordinance requires approval by at least 75% of shareholder votes entitled to be cast for any alteration to the company's constitution or capital structure, including: (i) altering the company's objective set forth in the company's memorandum; (ii) altering the Articles; (iii) changing the company's name; (iv) altering conditions in the Articles; (v) authorizing a reduction of capital; (vi) sanctioning a variation of the rights attaching to any particular class of shares at a class meeting; (vii) removing a director before the expiration of his period of office; and (viii) resolution that the company be wound up voluntarily.

## 9. Voting Tabulation and Results of Shareholders Meetings

### a. Methods of Voting

The Articles generally specify the method for voting. The Articles usually provide that subject to any special rights, privileges, or restrictions as to voting attached to any class or classes of shares, at any general meeting, on a show of hands every member who is present in person shall have one vote, and on a poll every member present in person or by proxy or corporate representative shall have one vote for every share of which he is the holder. At any general meeting, a resolution put to the vote of the meeting normally is decided on a show of hands unless a poll is required or requested. The Companies Ordinance protects a shareholder's right to demand a poll and voids provisions in a company's Articles that limit a shareholder's right to demand a poll except in certain instances.

### b. Tabulation

Company management generally is not required by law or its Articles to tabulate votes. Unless the Articles provide for tabulation and a method of enforcement, no steps can be taken to force tabulation under Hong Kong law.

### c. Verification of Votes

There are no general requirements governing the verification of results. Companies may specify procedures to verify votes in the Articles. However, as a matter of practice, the chairman usually appoints someone to oversee the polling procedures. Under common law, the organizers of a poll vote are entitled to know how members voted to verify the validity of the votes. The results of a vote are not confidential.

#### **d. Minutes of Shareholders Meetings**

The Companies Ordinance requires that the proceedings of shareholders meetings to be recorded and the minutes of general meetings be maintained at the company's registered office or at an office where the books are compiled. The minute books must be maintained within Hong Kong. The minutes of general meetings must be open to the inspection of any shareholder, without charge, during business hours and for not less than two hours each day. Shareholders are entitled to be furnished with a copy of the minutes within seven days after making a request for a minimal charge. The court may compel immediate inspection of the minute books and direct that copies be provided in the case of refusal. Penalties shall be imposed on the company and any officer that fails to honor these requirements.

In general, other than the chairman declaring the results of the meeting and the right of shareholders to inspect the minutes of general meetings, no information regarding the results of the meeting is required to be made available to shareholders after annual or special meetings. However, in certain circumstances, the Stock Exchange or the Securities and Futures Commission ("SFC") may require the company to publish the results of a shareholders meeting in English and Chinese language newspapers.

### **D. Rights of Minority Shareholders in Corporate Transactions**

#### **1. Minority Shareholders' Rights in Corporate Transactions**

A company's decisions on topics such as alteration of capital, variation of class rights, issuance of shares at a discount, etc. are made on the basis of a majority vote and in most cases this principle is sufficient to ensure that decisions are made fairly. The court generally will not interfere in this process unless a shareholder can establish a case. A minority shareholder in a corporate transaction (such as a merger, takeover, recapitalization, sale of assets, privatization, or other transaction that might negatively affect the shareholder's rights or value of the shareholder's shares) is afforded the same rights and protections as other shareholders under the Listing Rules, the Code, and the Companies Ordinance. These are designed to ensure that decisions (whether made by the board or the shareholders) are made fairly.

Transactions are categorized according to size, with the requirements of each transaction depending on its category. The Listing Rules detail which requirements apply in various circumstances. Substantial acquisitions and major transactions (each as defined in the Listing Rules) require, among other things, shareholder approval. Shareholders who have a material interest in the transaction are precluded from voting on a resolution regarding the transaction, and the views of the company's independent directors also are expected to be disclosed.

When controlling shareholders (i.e., over 35% of the company's voting rights) seek to use a "scheme of arrangement"<sup>11</sup> to privatize the company, the scheme of arrangement must be: (i) approved by a majority of 90% of the shares voted at a general meeting by shareholders other than persons seeking to privatize the company and persons acting in concert with them, or (ii) if not so approved by the requisite majority, not disapproved by shareholders holding more than 2.5% of the total number of shares in issue.

## 2. Mandatory Redemption or Sale

Shares may be subject to mandatory redemption or sale in the following circumstances:

### a. Takeover bids

The Companies Ordinance allows, in the case of a successful takeover, the acquiring company to acquire compulsorily the minority shares at the offer price if, within four months of making the offer to buy shares, the company has acquired 90% of the shares and gives the requisite notice to the dissenting shareholders in accordance with the timetable laid down in the Companies Ordinance.

Where notice is given to the holder of any shares, the acquiring company, subject to right of appeal by the minority shareholder, is entitled and bound to acquire those shares on the terms of the offer. A minority shareholder, therefore, automatically would receive the same sale price as other shareholders. A dissenting shareholder may petition the court for an order either preventing the compulsory purchase or specifying terms of acquisition different from those of the offer.

Just as the acquiring company can require the dissenting minority shareholders to sell their shares at the offer price, the dissenting shareholders can require the acquiring company to buy their shares at the offer price. Where the acquiring company is the holder of 90% of all the shares or a class of shares of the transferor company then, provided that the original offer period has not expired, a holder of the shares of the same class who has not accepted the offer may by letter addressed to the acquiring company require it to acquire its shares.

### b. General offers to buy back shares

Where a company makes a general offer to buy back its shares and purchases 90% of the shares within four months of the offer, the company may give notice to any shareholder that it desires to purchase the remaining shares. The company is entitled and bound to purchase those shares on the same terms as the offer, and two months after serving notice the shares may be cancelled and the purchase

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11 A scheme of arrangement is a statutory procedure whereby a company may make a compromise or arrangement with its shareholders or a class of its shareholders or creditors or class of creditors. A scheme is required to be approved by (i) a majority of three-fourths of the shareholders or class of shareholders voting on the scheme and (ii) the court. An explanatory note must be sent to all shareholders explaining the effect of the scheme.

money placed in a trust account for the persons who were entitled to the shares, provided there has been no application to the court to prevent the operation of the notice.

However, unlike the case of a takeover bid, any shareholders (“relevant shareholders”) who give notice to other shareholders that they will not tender any of their shares for purchase are excluded in calculating the 90% threshold and the company may not serve notice upon them to purchase compulsorily their shares. The relevant shareholders must give their notice to other shareholders prior to receiving notice of the meeting called to authorize the buy-back.

If, when the offer period expires, the total of the shareholding of relevant shareholders, and the shares purchased, is at least 90% of the shares subject to the offer, then the holders of any of those shares, other than relevant shareholders, may require the repurchasing company to purchase his shares. The company is entitled and bound to purchase the shares on the terms of the offer or as may be agreed or as the court, on the application of the company or the shareholder, orders.

#### **e. Transferability of Shares**

There are no special limitations on the ability of foreign or minority shareholders to sell or transfer shares of a public company, other than compliance with the transfer provisions (as stated in the Articles) and payment of the Hong Kong Stamp Duty.

#### **f. Accounting**

Every company is required by Companies Ordinance to keep proper records of its accounting. The Companies Ordinance does not grant shareholders a right of inspection of the accounting books, and the Articles generally do not allow access or inspection rights to the accounting books of the company. This applies regardless of the form of shareholding or the amount of shareholding. The Companies Ordinance also requires that directors of a company present at the annual meeting a profit and loss account and balance sheet. Directors who fail to take all reasonable steps to prepare the accounts for this meeting are liable for imprisonment and a fine.

The auditors of a company may access at all times the books and accounts and may require from the officers of the company such information and explanations as necessary for the performance of the duties of the auditors. The auditors of a company are required to make a report to the board on the accounts examined by them, and on the balance sheet, profit and loss account, and all group accounts in a general meeting during their tenure of office. The auditor’s report is presented at the general meeting and is open to inspection.

#### **g. Inspection Rights**

Shareholders have the right to inspect the shareholder register during limited business hours without charge. Shareholders also have the right to inspect the books containing the minutes of any general meeting during limited business hours without charge. Any shareholder is entitled, within seven days after making a request to the company, to a copy of any such minutes at a minimal charge. There is no statutory right to inspect the minutes of the meetings of directors and the Articles typically do not grant this right. The Companies Ordinance



provides that shareholders may request a copy of the company's memorandum of association and of the Articles. If an inspection is refused, the company and its officer are liable for a daily default fine. The court may compel an immediate inspection or direct that copies be sent to the requestor.

## II. Payment of Dividends

### A. Declaration of Dividends

The declaration and payment dividends are governed by the memorandum of association and Articles. Generally, dividends are declared by Ordinary Resolution<sup>12</sup> in an amount not to exceed that recommended by the directors. The directors also may from time to time pay interim dividends of such amounts and on such dates out of such distributable funds as they deem appropriate. The Articles, subject to compliance with statutory requirements, specify whether the dividend distributions are mandatory or discretionary. Typically, a company uses a record date to determine shareholder entitlement to dividends.

The Stock Exchange requires that a company inform the Stock Exchange immediately after approval by the board of any decision to declare, recommend, or pay any dividend or to make any other distribution on its listed securities and the amount thereof, or any decision not to declare, recommend, or pay any dividend that would otherwise have been expected to have been declared, recommended or paid in due course. The directors are required to ensure that such information is kept strictly confidential until an announcement to the Stock Exchange is made. The announcement of the decision is published in an English and Chinese newspaper on the morning of the next business day following notification to the Stock Exchange.

### B. Treatment of Different Shareholders

Different dividend payments and payment schedules are not permitted for minority and majority shareholders or domestic and foreign shareholders that hold the same class of shares.

### C. Methods of Payment

The Articles specify how dividends are paid. Dividends are usually paid in cash, but the board of directors may resolve that dividends be satisfied wholly or in part by the distribution of specific assets of any kind and, in particular, paid up shares, debentures, or warrants to subscribe for securities of the company or any other company, or in any combination of these ways. Dividends are payable normally only in local currency. Cumulative dividends are permitted but not required.

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<sup>12</sup> *Ordinary Resolutions are the most common form of resolutions and are used for all routine business at general meetings. Ordinary Resolutions require a simple majority of the votes cast at a meeting for which proper notice has been given in accordance with the company's Articles.*

## III. Affiliated Transactions

### A. Transactions by a Company and its Affiliates

Restrictions or limitations on transactions by a company with its affiliates (for example, transactions with officers, directors or employees, or with other affiliated companies) are contained in the Articles, the Companies Ordinance, and the Listing Rules.

#### 1. Companies Ordinance

Where a director is in any way directly or indirectly interested in a contract or proposed contract with the company, he must declare that interest at the earliest meeting at which it is practicable for him to do so. The Articles normally will specify whether a director is disqualified from entering into a contract with the company and whether he is allowed to vote in respect of a contract in which he is so interested. The Companies Ordinance restricts a company in making loans to its directors, and there are criminal penalties for contravention of this provision.

#### 2. Articles

Under most forms of Articles, directors are not disqualified from contracting with the company in any manner by reason only of their directorships with the company. However, a director who is interested in a contract must declare the nature of his interest to the meeting of the board at which the question of entering into the contract is first taken into consideration and typically would be precluded from voting on the resolution of directors in respect of such contract.

#### 3. Listing Rules

The Listing Rules, which apply to all companies listed on Stock Exchange, limit certain affiliated transactions.<sup>13</sup> A connected transaction may require independent shareholder approval and/or a circular to be sent to shareholders setting out details of the transaction, a valuation or accountants' report and an opinion by an independent expert as to whether the transaction is fair and reasonable as far as the

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<sup>13</sup> *An affiliated or "connected transaction" is (i) any transaction between a listed company or any of its subsidiaries and a "connected person"; or (ii) any transaction whereby a listed company acquires an interest in a company, and a company that has as a controlling shareholder, any director, chief executive or controlling shareholder of the acquiring group, or an associate of any of them.*

*A "connected person" is a director, chief executive, substantial shareholder, or promoter of the company or any of its subsidiaries or an associate of any of them.*

*"Associate" includes a holding company, subsidiary, and sister company of a substantial shareholder that is itself a company, together with any company in which any of them can control 35% or more of the voting power at general meetings or can control the composition of its board of directors.*

shareholders are concerned. The views of the company's independent non-executive directors also are expected to be disclosed. If a company proposes to enter into a connected transaction, it is important that the Stock Exchange be consulted at an early stage if a waiver is necessary.

## **B. Restrictions on ownership and issue**

There generally are not limitations on the ability of an officer, director, or an employee of a company to own more than a certain percentage of stock. However, the Listing Rules do require specified percentages of a listed company's shares to be in "public hands." The Stock Exchange will not regard shares held by an affiliate of a connected person of the company as being in "public hands." The percentage depends on the company's market capitalization but is usually 25% for companies listed on the main board and 20% for companies listed on GEM.

A company is able to issue stock to its officers, directors, and employees at a price below market price. However, any issue of securities to an affiliate or connected person (whether or not at or below market price) would be a connected transaction and subject to limitation. Securities that are issued to a connected person under an employee or executive share scheme that complies with the Listing Rules do not require disclosure or shareholder approval, but the scheme itself must be approved by shareholders.

# **IV. The Role of Local Regulators and Stock Exchanges in Enforcing Shareholder Rights**

## **A. Responsibility of the Board of Directors**

There is no body of law that requires the board of directors, of a company to represent the interests of the shareholders of the company. Directors owe a duty to the company and not its shareholders. However, a director: (i) must not put himself in a position where the interests of the company conflict with his personal interests or his duty to a third party; (ii) must not profit from his position as a director unless the company permits him to do so; and (iii) must act in good faith and in the interests of the company.

Directors may be personally liable for breach of fiduciary duty. The Listing Rules do require the directors of listed companies to act in the interests of shareholders as a whole, particularly where public shareholders are in the minority. The Listing Rules also require directors to fulfill fiduciary duties and duties of skill, care, and diligence to a standard at least equivalent to those established under Hong Kong law, including those required under the Code and the Companies Ordinance. Specifically, a director is required: (i) to act honestly and in good faith in the interests of the company as a whole; (ii) to act for a proper purpose; (iii) to avoid actual and potential conflicts of interest and disclose fully his interests in contracts with the listed group; and (iv) to apply such degree of skill, care and diligence as may be expected of a person of his knowledge and experience holding his office.

## B. Enforcement of Rights by Local Regulators

The Listing Rules and a company's Listing Agreement with the Stock Exchange do not have the force of law, but the Stock Exchange may impose sanctions including cancellation or suspension of the company's listing, private reprimand, or public censure if there has been a breach of the Listing Rules or Listing Agreement. The Stock Exchange also may require a breach to be remedied and effectively may force a director's resignation by stating publicly that, in the opinion of the Stock Exchange, the retention of office by that director is prejudicial to investors. If the affairs of the company are being or have been conducted in a manner unfairly prejudicial to the interests of some of its shareholders, the SFC may apply for relief. In the case of a company that may be wound up by the court under the Companies Ordinance, if it is in the public interest for the company to be wound up, the SFC may present a petition for it to be wound up. In practice, the Stock Exchange and SFC play an active role in enforcing shareholder rights contained in the Listing Rules and the Code.

## C. Enforcement of Rights through the Judicial System

The Listing Agreement and the Listing Rules take the form of a contract between the listed company and the Stock Exchange and do not create an opportunity for third parties to enforce the continuing obligations of their company, except bring the matter to the attention of the Stock Exchange or the SFC.

A shareholder may bring a petition to wind up a company on "just and equitable" grounds, for example, where the main objective of the company has failed, where the company was formed to carry out a fraud or to carry on an illegal business, or where the members have formed a company on the basis of a relationship involving mutual trust and understanding that no longer exists. However, the Companies Ordinance permits shareholders to apply to the court for an order on the grounds that the affairs of the company are being or have been conducted in a manner that is unfairly prejudicial to the interests of the shareholders generally. The Companies Ordinance does not, however, define what would constitute "unfairly prejudicial" conduct.

Moreover, the court will intervene to allow an individual shareholder to bring an action in the following circumstances: (i) to enforce a shareholder's individual right (for example, a private contract or payment of a dividend); (ii) to enforce the rights of a representative of several shareholders that have been infringed in a similar way; and (iii) where the alleged wrongdoers are in control of the company making it impossible for the company to bring an action in its own name. There is no requirement that shareholders exhaust remedies with the issuer before pursuing court assistance.

There is no percentage or form-of-ownership (such as common stock or preferred stock) requirement to seek redress through the judicial systems for enforcement of shareholders' rights. Minority and/or foreign shareholders have the same rights and in practice are treated the same as majority and domestic shareholders in the judicial system. A derivative action is regarded as exceptional and must be brought bona fide in the interests of the company and not for personal reasons.

## V. Financial Information and Auditors

### A. Financial Information

Pursuant to the Companies Ordinance, the directors of every company must present a profit and loss account at the annual general meeting. Companies with a primary listing on the Stock Exchange are expected to present their annual report and accounts (which must be audited) in accordance with Hong Kong or international accounting standards. If the Stock Exchange permits the accounts to be drawn up other than in accordance with those standards, they must contain a statement of the financial effect of the material differences from those standards. The accounts are published in English with a Chinese translation.

The annual report and accounts are prepared not more than five months after the relevant financial year-end, and the company's annual general meeting is held not more than six months after the relevant financial year-end. The annual report and accounts are circulated to all holders of the company's listed securities not less than 21 days before the company's annual general meeting and copies also are delivered to the Stock Exchange. An interim report (in English and Chinese) is announced in the newspapers and sent to all holders of listed securities within three months of the end of the first six months of each financial year of the company. The interim report must contain information specified in the company's Listing Agreement with the Stock Exchange, which includes unaudited details of turnover, profit (or loss), and taxation, both in Hong Kong and overseas, but it need not be audited and no balance sheet is required. The company also must publish in the newspapers a preliminary announcement of the full year's results containing similar information to that required to be published in respect of the interim report. The preliminary announcement and interim report are, of course, acutely price-sensitive before they are made public, and compliance by the directors with the confidentiality requirements in the Listing Rules is very important.

### B. GEM Companies

Companies listed on the GEM are required to prepare annual accounts, half-year reports, and quarterly reports. The annual report is sent to every holder of its listed securities not less than 21 days before the date of the company's annual general meeting and not more than 3 months after the date upon which the financial period ended and is required to conform to Hong Kong or international accounting standards. The company prepares, in respect of each of the first 3-, 6-, and 9- month periods of each financial year of the company, an interim report containing the information set out in the GEM Listing Rules. These must be published (in printed form and submitted for publication on the GEM website) not later than 45 days after the end of such period. Any publication by a company pursuant to the GEM Listing Rules must be made in both English and Chinese languages unless otherwise stated.

### C. Auditors

A person only can be appointed as an auditor if he is qualified under the Professional Accountants Ordinance and he is not: (i) an officer or servant of the company ("officer" includes a director, manager, or secretary); (ii) a person who is a partner or employee of an officer or servant of the company; or (iii) a person disqualified under any one of the above grounds in relation to a company's subsidiary, its holding

company, or a subsidiary of its holding company. A person appointed as auditor who ceases to be qualified or who becomes disqualified before the end of the period of his appointment must vacate the office immediately.

An auditor may resign his office at any time by filing notice in writing at the registered office of the company. The notice must contain a statement to the effect that there are no circumstances connected with the resignation that should be brought to the notice of the shareholders or creditors of the company or a statement of any such circumstances. The company shall send a copy of the notice to the Registrar of Companies within 14 days of receiving the notice, and where the notice includes a statement raising circumstances of concern the company must send a copy to every person entitled to receive a copy of the auditor's report. The auditor may call for the directors to convene a meeting for the purpose of receiving and considering the auditor's explanation. The directors must then proceed to convene the meeting within 21 days from the deposit of the requisition.

An auditor who has resigned is entitled to attend the general meeting at which his term of office would otherwise have expired, a new general meeting at which it is proposed to fill the vacancy caused by his resignation, and a meeting convened on his request. He also is entitled to receive all notices and other communications relating to such meetings that any shareholder of the company is entitled to receive and to be heard at such meetings and any part of the business of the meeting that concerns him as a former auditor of the company.

## VI. Depositary Receipts/Nominee Rights

The holders of depositary receipts (such as ADRs or GDRs) are not recognised in Hong Kong as the holders of the securities underlying the depositary receipt. Holders of ADRs or GDRs cannot vote at shareholders meetings unless they have been given a proxy by the custodian. In order for the ADR/GDR holders to attend and vote at meetings, it would be necessary to remove the shares from the depositary receipt and transfer them into the name of the ADR or GDR holders so that their names appear on the company's share register. An instrument of transfer (and a bought and sold note if Hong Kong stock) duly signed by the transferor and transferee and duly stamped together with the relevant share certificates is required to be submitted to the company's share registrar in order to transfer the shares from the ADR program to the individual holders. Holders of ADRs/GDRs cannot enforce their rights against the company and the ADR/GDR holders must seek redress through the entity that established the program.

## VII. Corporate Governance Code

There currently is no code of conduct or corporate governance code for Hong Kong companies. However, there are various continuing requirements for listed companies in the Listing Rules and publications issued by the Hong Kong Stock Exchange. Appendix 14 of the Listing Rules contains a Code of Best Practice, which contains guidelines with respect to conducting board meetings.

In March 2000, the Financial Secretary of Hong Kong announced the formation of a committee to review Hong Kong's corporate governance practices. To date, a review of such practices has not been completed.





Asia

Japan

# Japan



This memorandum was prepared based upon information provided by Hamada & Matsumoto of Tokyo, Japan and addresses the law and general corporate practices of joint stock corporations in Japan. The information contained herein is based on the Commercial Code of Japan (“Code”), the Securities and Exchange Law of Japan, and other relevant laws and is current as of July 1, 2000.

In this memorandum, the term “company” refers only to a joint stock corporation (“*Kabushiki Kaisha*”). All Japanese companies listed on the Japanese stock exchanges are joint stock corporations.

## I. Rights of Shareholders<sup>1</sup>

### A. Share Ownership

Japanese companies are permitted to issue different classes of stock having different voting and/or dividend rights (e.g., voting, non-voting, and/or preferred stock).

### B. Voting Rights of Shareholders

Voting rights are determined by the Code and also by a company’s articles of incorporation. Shares of the same class must have the same voting rights, and there is a general one-share, one-vote requirement with certain exceptions. Voting rights of a class of shares cannot be altered except with shareholder approval.

Fractional shares and shares of less than one “unit”<sup>2</sup> cannot have voting rights. Fractional shares may be created upon issuance of new shares or by consolidation or share splits by corporations. Holders of fractional shares are listed in a company’s fractional stockholders register, unless the holders request not to be registered. Upon registration, they are entitled to some limited rights, but cannot vote at shareholders meetings.

Voting rights are altered for affiliated companies. If an affiliated company owns 25% or more of the total number of issued shares of a company, including through a parent entity, the affiliated company cannot vote those shares.

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<sup>1</sup> Information provided in this section is based principally on the Commercial Code of Japan.

<sup>2</sup> The “unit” system of shares was introduced for corporations established before 1981. Prior to 1981, companies were not required to have a minimum par value for shares and commonly priced shares at fifty (50) yen per share. After 1981, Japanese law required companies to have a minimum par value of 50,000 yen, although the par value of companies established before 1981 was not required to change. In order to increase the minimum value of trading units of shares to the same level as companies established after 1981, most companies established before 1981 adopted 1,000 shares as one “unit” of shares. Certificates for shares constituting less than one unit may only be issued in certain limited circumstances. Since the transfer of shares normally requires delivery of the certificates, fractions of a unit for which no share certificates are issued are not transferable. A holder of shares constituting less than one unit can force the company to redeem the shares.

Non-voting preference shares have the right to vote at shareholders meetings if an agenda item:

- a. affects the payment, or omits payment, of the preferential dividend;
- b. alters the corporate articles to require the approval of the board of directors for transferring shares; or
- c. converts the company into a private company (*Yugen Kaisha*); or
- d. affects the rights of non-voting preference shares.

The quorum requirement for a meeting of non-voting shares would be 50% of the shares affected by the vote. For minimum shareholding requirements to call a meeting of non-voting shares, see Section C.3. below.

Cumulative voting is permissible, unless otherwise stated in the corporate articles.

Shareholders who want to cast votes in opposing directions must notify the company of this intent in writing, and the reason why, at least three days before a shareholders meeting. Shareholders voting shares held in trust or for the benefit of other persons will be permitted to cast their votes in this manner, but the company can refuse to let other shareholders vote in this manner.

The rights of foreign investors to vote their shares are not subject to any restrictions or limitations that do not apply to domestic investors, except for certain companies that are subject to restrictions or limitations based on national policies or national security. However, in practice, foreign shareholders may be faced with some disadvantages (for example, all notices and materials are written in Japanese).

Where shares are held in the name of a nominee, such as a brokerage firm or a custodian, generally only the nominee can vote the shares. Beneficial owners<sup>3</sup> can vote only by giving voting instructions to the nominee.<sup>4</sup>

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<sup>3</sup> A “beneficial owner” is the owner of a security registered in another’s name (such as in the name of a broker).

<sup>4</sup> In the case of ADRs, if a depository entity participates in the central clearing system of Japan, then the ADR holders could, in theory, be registered with the central clearing system and have the rights of shareholders. However, in practice, the U.S. holder of Japanese shares underlying an ADR program would not be registered with the Japanese central clearing system; only the Japanese bank or broker would be registered. Thus, ADR holders generally do not have voting or any other shareholder rights.

## C. Shareholders Meetings

### 1. Record Date

The Code incorporates the practice of using record dates to determine share ownership and the capacity to vote shares at a shareholders meeting; however, this is not mandatory and the date is not uniform. Each company is permitted to close its register of shareholders for up to three months prior to a shareholders meeting. This procedure is called the “Suspension of Altering Entry in the Register of Shareholders,” and is similar to the concept of “record date.” Most Japanese listed companies have adopted this practice, and generally suspend entries into the register from the end of the fiscal year up to the date of the general shareholders meeting. The general shareholders meeting is held annually and the record date determines who can vote at that meeting and who can receive dividends declared at that meeting.

Record dates are determined by the board of directors, unless the date has been designated by the corporate articles. If not specified in the corporate articles, the record date must be determined at least three months before the date on which the shareholders would exercise their rights (e.g., attendance at the shareholders meeting), and the company must give public notice of the record date two weeks in advance. The period of suspension cannot exceed three months.

Shares of the company may be freely traded after the record date and prior to a shareholders meeting. However, a purchaser of shares cannot register its name in the register of shareholders during the suspension period and cannot claim its rights as a shareholder against the company. Thus, the new purchaser could not attend and vote at the next shareholders meeting.

### 2. Notice Requirements for Shareholders Meetings

Companies in Japan are required to announce shareholders meetings (the annual general and extraordinary meetings) to the shareholders. Unless all of the shareholders agree to waive the notice requirement, a notice must be given to each shareholder at least two weeks prior to the date of the meeting. The notice is delivered to the registered address of the shareholder listed in the register of shareholders or any other address the shareholder has provided to the company.

No special notice requirements are imposed either by contract or by law upon companies that have taken affirmative action to qualify their shares for trading outside of Japan, such as by establishing American Depositary Receipt (“ADR”) or Global Depositary Receipt (“GDR”) programs. Notice of shareholders meetings only would be provided to the registered shareholders listed in the company’s register of shareholders and to depositary institutions and their customers registered with the central clearing system of Japan.

Notices only are required to be written in Japanese, unless otherwise provided in the corporate articles. The notice must include the entire agenda, date, and location of the meeting. An agenda item that is not included in the notice for a shareholders meeting cannot be added to the agenda, unless all of the shareholders of the company attend the meeting or consent to waive the notice.

### 3. Shareholder Proposals

Certain shareholders have the right to propose a matter for consideration at the annual general meeting of shareholders. A shareholder holding at least 1% of the total number of issued shares, or 300 shares (or units) for at least six months may request that a matter be considered. The request must be made in writing to the directors at least six weeks before the shareholders meeting. The matter must be within the scope of matters that can be considered at a shareholders meeting under Japanese law.

Shareholders that meet the same criteria also have the right to propose a specific resolution for inclusion in the agenda published in the notice of a shareholders meeting. The request to the directors must be made in writing at least six weeks before the meeting. Shareholders cannot propose a resolution in violation of the law or corporate articles and cannot repeat a proposal that received less than 10% of the votes at a shareholders meeting within the last three years. A shareholder can nominate a candidate to the board of directors of the company or propose the removal of a board member by proposing a resolution.

A shareholder holding at least 3% of the total number of issued shares continuously for at least the last six months can call an extraordinary meeting of the shareholders. The shareholder must file a written request for the meeting with the board of directors that states the matters to be considered and the reasons why the meeting is necessary. The board is required to send out notices and hold the meeting within six weeks after the request is made. If it does not, the shareholder can petition a court for permission to convene the meeting.

Shareholders that hold non-voting shares and holders of ADRs generally do not have the right to propose a matter or a resolution for a shareholders meeting or to convene an extraordinary shareholders meeting.

### 4. Proof of Shareholder Status

A shareholder must be registered in a company's register of shareholders to be legally recognized as a shareholder for the purpose of voting shares at a shareholders meeting. Registered owners of shares deposited with a Japanese institution (such as a fund depositing shares with a Japanese bank) under the central clearing system of Japan also have the right to attend meetings and vote. Only these record owners of shares may exercise voting rights. Physical possession of shares is not required to vote.

### 5. Attendance at Shareholders Meetings

Generally, only record owners of voting shares are permitted to attend shareholders meetings. Beneficial owners and holders of ADRs generally cannot attend shareholders meetings and cannot vote.

In Japan, a substantial number of listed companies end their fiscal year on March 31 and have their annual general shareholders meeting on the same date and at the same time. Therefore, a shareholder of more than one listed company may not be able to attend the shareholders meetings of all of the companies. This practice was established in Japan to prevent Japanese “*sokaiya*” (gangsters) from attending the

shareholders meetings of a large number of companies. However, this can be very inconvenient for any individual shareholder that wants to attend multiple general shareholders meetings. This practice is starting to change.

Registered owners of voting shares only need to present satisfactory proof of identity to be admitted to a shareholders meeting. In general practice, companies send an attendance card to each shareholder with the notice of the meeting. Possession of the attendance card may serve as satisfactory evidence of a shareholder's identity to enter the shareholders meeting. Individual officers representing corporate shareholders will need to bring a document demonstrating his authority to act on behalf of the shareholder. If a shareholder votes by proxy, the proxy document must be submitted to the company. These documents are not required to be notarized, authenticated, consularized, or translated into Japanese. However, if the language used in the document would not be readily understood, it should be translated into Japanese.

Shareholders are permitted to ask questions at shareholders meetings. A shareholder can request permission to bring an interpreter, but this request is granted at the discretion of the chairman of the meeting.

Each shareholders meeting has a chairman who administers procedural rules for the conduct of the meeting. The chairman can remove a disobedient or disorderly shareholder from a shareholders meeting.

## 6. Proxy Voting

Voting by mail is not permitted in Japan, except with respect to large companies having a stated capital of at least 500 million yen or having total liabilities of at least 20 billion yen, with at least 1,000 shareholders. These shareholders are allowed to vote in writing to the company instead of voting in person at a shareholders meeting. The notice to convene a shareholders meeting for these large companies will include a voting form for this purpose. The vote document must be received by the company at least one day before the shareholders meeting.

Under Japanese law, a shareholder can delegate authority to any other person as proxy to vote shares at shareholders meetings. A record shareholder, such as a custodian, could delegate authority to the beneficial shareholder to vote at a meeting. However, many companies specify in their corporate articles that only another shareholder can act as a proxy. This restriction is somewhat controversial. Although the Supreme Court of Japan has ruled that this type of restriction can be valid, certain lower courts recently have not enforced this restriction. Proxy documents should be executed in writing as a power of attorney, but there are no other special requirements. A company may require that the proxy be translated into Japanese if it is in a language that no one in Japan would understand.

It should be noted that officers and employees of corporate shareholders can attend shareholders meetings as representatives of the shareholder but do not need to be acting as proxies. These representatives would, however, have to bring some document showing their authorization to act on behalf of the shareholder to the meeting.

The proxy must file the proxy document with the company no later than the time of the meeting. However, it is advisable to file the proxy document with the company prior to the meeting to allow the company time to verify the documentation. Foreign investors can be represented by a local attorney or other local representative to vote at a meeting, but this is not required. The corporate articles may permit foreign investors to appoint a regular proxy resident in Japan to exercise voting rights; in this case, the shareholder only would have to notify the company one time of the appointment of the proxy, and the proxy would not have to present a proxy document at every shareholders meeting.

The company may refuse to admit more than one proxy acting on behalf of the same shareholder to a shareholders meeting. However, a proxy can act on behalf of more than one shareholder and can vote in favor of a proposal on behalf of one client and against the same proposal on behalf of another client. If a broker, custodian, or other nominee is acting on behalf of several beneficial shareholders and intends to vote shares differently on behalf of different beneficial shareholders, the broker, custodian, or other nominee must give three days' prior written notice to the company.

## 7. Quorum

In general, the quorum to conduct business at a shareholders meeting is a majority of the outstanding shares of the company. Companies are permitted to reduce this number in their corporate articles, and most companies have done so. However, for a resolution to appoint directors or statutory auditors, the quorum cannot be less than one-third of the total number of issued shares. The number of shares present or represented at a shareholders meeting is counted when attendees' identification is checked at the entrance to the shareholders meeting.

A resolution for postponement or adjournment may be adopted by the shareholders at a meeting. The resolution also would determine the time, date, and location of the replacement meeting, unless the decision is delegated to the chairman of the meeting. The second meeting must be held within a reasonable period of time (approximately two weeks) after the original meeting. Only the shareholders that attended the original meeting can vote at the second meeting, and notice is not provided to other shareholders. However, this rule does not apply in the event a quorum is not obtained. If a quorum is not obtained, additional votes must be solicited.

## 8. Voting and Supermajority Provisions

A shareholder may exercise the right to vote in person, by proxy, or by execution of a written vote.

Except as otherwise provided by the corporate articles, the general requirement for adoption of a resolution at a shareholders meeting is a majority of votes present at a meeting. A company can establish a higher percentage requirement in its corporate articles. A supermajority is required for some resolutions, including to: amend the corporate articles; increase the total number of shares authorized to be issued; reduce the stated capital; remove a director or statutory auditor; merge or consolidate the company; transfer all or an important part of the business; acquire another company; or offer new shares, or certain bonds, to non-shareholders at a "specially favorable" price. For these measures, the approval of the holders of at least two-thirds of the shares having voting rights, present or represented at a shareholders meeting, is required.

A shareholder that has unlawfully solicited or received any benefit, or entered into an agreement for a benefit, in connection with voting at a shareholders meeting can be punished with imprisonment for up to five years and/or a fine of up to 5 million yen.

## 9. Voting Tabulation and Results of Shareholders Meetings

Unless otherwise specified in the corporate articles, any method for counting shareholders' votes may be adopted by the chairman of the meeting, so long as the shareholders present at the meeting can clearly confirm the results of the voting process. For example, voting may be accomplished by use of voting cards, oral voting or oral confirmation of dissenting votes, by show of hands, or by standing. With certain exceptions noted above, each shareholder generally will have one vote for each share of stock.

A shareholder at a meeting can request a formal count of the number of shares voted on a measure, but the chairman may refuse this request. Management of a company is not required to tabulate votes or to honor any request to do so. However, a shareholder holding at least 1% of the total number of issued shares for at least six months may petition the courts to appoint an inspector in advance of the shareholders meeting for the purpose of monitoring the procedures used to convene the meeting and pass resolutions.

Minutes must be recorded of shareholders meetings and must contain the substance of the course of the proceedings and the results. The directors present at the meeting and the meeting chairman must sign the minutes. Shareholders may, at any time during business hours, request access to the minutes, proxy documents, and any other voting records at the company's offices. The company only can deny access to these documents if the shareholder's request serves no reasonable purpose.

## D. Rights of Minority Shareholders in Corporate Transactions<sup>5</sup>

Minority shareholders have dissenters' rights in certain corporate transactions. Dissenting shareholders that file this dissent in writing with the company before the shareholders meeting and vote against the measure at the meeting can demand that the company redeem their shares for their fair value had the resolution not been passed. Dissenters' rights can be exercised with respect to the following types of transactions:

1. The transfer of all, or of an important part, of the business of the company;
2. The making, alteration, or rescission of a contract for leasing the business, for management of the business, or for sharing profit/loss with another person, or of a similar contract;
3. The acquisition of any other company;

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<sup>5</sup> Information in this section is based principally on the Commercial Code of Japan.

4. Alteration of the corporate articles to require the approval of the board of directors for a transfer of shares;
5. Merger of the company; and
6. Converting the company into a private company.

Under no other circumstances can a shareholder's shares be subject to mandatory redemption or sale, except in the case of dissolution or liquidation of the company.

The "fair value" of shares is agreed upon between the shareholder and the company. If they do not come to agreement within 60 days after the resolution was adopted, the shareholder may, within 30 days, file a demand with a court asking for a determination of the fair value of the shares. In exercising dissenters' rights, a minority or foreign shareholder would receive the same sale price as any other dissenting shareholder.

## E. Transferability of Shares

Under Japanese law, there are no limits on the ability of a foreign or minority shareholder to sell or transfer shares of a Japanese company; however, many non-listed companies provide in their corporate articles that the transfer of shares requires the approval of the board of directors.

## F. Accounting

Any shareholder holding at least 10% of the total number of issued shares (including non-voting shareholders) may demand to inspect or to make copies of the books, records, and accounts of a company. The shareholder must file this request in writing, stating the reasons for the inspection, with the company.

## G. Inspection Rights

Any shareholder may, at any time during business hours, inspect the articles of incorporation, the register of shareholders, the register of debentures, and minutes of shareholders meetings at the company's offices at no charge. Shareholders also have the right to examine certain financial documents (see Section V below).

## II. Payment of Dividends

The payment of a dividend distribution by a company is discretionary. Dividends are declared by the board of directors and approved at a shareholders meeting. Except for listed companies, a public announcement of the payment of a dividend is not required, and most Japanese companies do not voluntarily publish an announcement.



The identity of shareholders entitled to a dividend is determined by the register of shareholders. Only those shareholders listed on the register on the date the register is closed before the annual general shareholders meeting can attend and vote at the meeting and receive dividends approved during that meeting. Generally, Japanese companies suspend new entries into the register from the end of the fiscal year up to the date of the annual general shareholders meeting.

There are no requirements governing the timely receipt of information by shareholders, such as the dividend record date and the payment date. However, once the shareholders meeting approves payment of a dividend, the dividend must be paid in a timely manner, unless otherwise provided in the corporate articles or resolved by the shareholders meeting.

Dividends generally are paid by bank transfer or by mail in local currency, unless otherwise provided in the corporate articles. Different dividend payments are not permitted for minority and majority shareholders or domestic and foreign shareholders, except by class of shares.

Cumulative dividends are permitted, and may be required, where preferred stock is entitled to past-due dividend payments before common stock dividends can be paid.

### III. Affiliated Transactions<sup>6</sup>

There are no general restrictions on transactions by a company with its officers, employees, or other affiliated companies, although affiliated companies may not be able to vote if they own more than 25% of the stock of a company (see Section I.B. above).

There are certain restrictions on transactions by a company with its directors. Approval of the entire board of directors must be obtained for an individual director to: acquire the company's products or property; transfer his products or property to the company; receive loans from the company; or to effect any transaction with the company that benefits the interests of that director or a third party related to that director. Board approval is required where the company guarantees the liability of a director. Board approval also is required to conduct any of these transactions with another company that is represented by one of its board directors.

There are no restrictions on the ability of an officer, director, or employee of a company to own more than a certain percentage of stock in the company. However, there are restrictions on the ability of an issuer to sell its shares to its officers, directors, and employees at a price lower than the current market price. If new shares are issued to non-shareholders at a favorable issue price and the shareholders are not granted pre-emptive purchase rights to the new shares, the resolution to issue the new shares must be adopted by at least two-thirds of the votes at a shareholders meeting. The resolution also will determine whether the new shares will be at par value, and the class, number, and minimum issue price. The directors will have to explain at the shareholders meeting the reasons why the new share issue is necessary and why it should benefit non-shareholders.

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<sup>6</sup> Information in this section is based principally on the Commercial Code of Japan.

## IV. The Role of Local Regulators and Stock Exchanges in Enforcing Shareholder Rights

### A. Responsibility of the Board of Directors

Japanese law does not require the board of directors of a company to represent the interests of the shareholders of the company. Directors only have a fiduciary duty to the company and can be held personally liable for a breach of this duty. In practice, there have been many cases in Japanese courts imposing liability on directors for a breach of this duty. Directors have an indirect duty to shareholders to the extent that the directors have a duty to act in the best interests of the company, which is owned ultimately by shareholders.

As a general rule, directors are required to obey all laws, as well as the corporate articles and resolutions of the companies they serve. They have a fiduciary obligation to perform their duties faithfully on behalf of the companies they represent.

### B. Enforcement of Rights by Local Regulators

Japanese law does not require a regulatory body to protect the rights of shareholders.

However, the local stock exchanges do oversee shareholders' rights with respect to listed companies. In certain areas, such as payment of dividends and the ability to transfer shares, the local stock exchanges take an active role in enforcing shareholders' rights. In the most egregious cases, the stock exchanges can impose the penalty of de-listing a company.

### C. Enforcement of Rights through the Judicial System

The Commercial Code of Japan permits shareholders to seek redress through the judicial system for the violation of their rights as shareholders. Shareholders can file claims in court for compensation for damages and for specific or equitable remedies. There is no requirement that shareholders exhaust remedies with the issuer, except in certain limited cases.

In addition to the general right of shareholders to commence a lawsuit against a company, any shareholder holding at least one share (voting or non-voting) for at least the past six months can demand, in writing, that the company institute an action against the directors. If the company does not commence the action within 30 days after the shareholder's demand, the shareholder can institute an action on behalf of the company (this is known as an "Action on Behalf of the Company" or a derivative suit).

In general, minority and foreign shareholders are treated the same as domestic shareholders under the judicial system. In practice, minority and foreign shareholders have been able to enforce their rights in this manner.

## V. Financial Information and Auditors

The Commercial Code of Japan requires all joint stock corporations to prepare an annual financial report for each fiscal year and regulates the method of preparation and contents of these reports. In addition, the Securities and Exchange Law of Japan requires preparation and disclosure of annual and periodic financial reports of listed companies. None of these documents are required to be published in any language other than Japanese.

Under the Commercial Code of Japan, the following accounting documents must be prepared by a company: balance sheet; profit and loss statement; annual report; proposals relating to the disposition of profits and/or loss; and auditors report. The documents must be prepared at least two weeks before the annual general shareholders meeting and must be included with the notice sent to shareholders convening the meeting. In addition, any shareholder or creditor of a company may inspect these documents at the company's offices during business hours or request copies of these documents. Copy requests may be subject to fees by the company. After obtaining the approval of the shareholders at the annual general meeting, the company will issue a public notice of the balance sheet results.

Listed companies are required to disclose their accounting documents twice a year, by filing annual and semi-annual reports with the Director of the Kanto Local Finance Bureau of the Ministry of Finance, in accordance with the Securities and Exchange Law of Japan. The annual and semi-annual reports must be prepared and audited within three months from the end of the company's fiscal year and within three months from the end of the first half of the year, respectively.

There are regulations that impose standards on auditors and require independence of auditors from management.

There are two types of auditors in Japan. In accordance with the Commercial Code of Japan, at least one "statutory auditor" (in-house auditor) must be elected by the general meeting of shareholders. A statutory auditor cannot be a director or employee of the company or any of its subsidiaries but is not required to be an independent certified public accountant. Their statutory duties include examination of the company's accounts and also of the general administration of the company by the directors. They are entitled to attend board meetings and to express their opinions, although they are not entitled to vote.

Large listed companies (having a stated capital of at least 500 million yen, or having total liabilities of at least 20 billion yen on the last balance sheet) also are required to appoint independent certified public accountants. These accountants are required to examine the company's financial statements and to report their opinions on financial information to the statutory auditors and the board of directors. The independent certified public accountants also conduct audits in conjunction with the preparation of the annual and semi-annual reports to be filed with the Ministry of Finance. If the independent certified public accountant is terminated, the statutory auditors must report the termination of the accountant and the reason for the termination at the next shareholders meeting. The terminated accountant can attend the meeting and state his views.

## VI. Depositary Receipt/Nominee Rights

The holders of depositary receipts (such as ADRs or GDRs) are not recognized in Japan as the holders of the securities underlying the depositary receipt program. Thus, ADR and GDR holders generally cannot attend or vote at shareholders meetings. Only the registered owner (the nominee or depositary) may attend and vote at shareholders meetings.<sup>7</sup>

Depending on the terms of the deposit agreement and/or arrangements between the Japanese issuer, the depositary, and the holders of the ADRs, it may be necessary for the ADR holders to remove the shares from the depositary receipt program to attend and vote at shareholders meetings. Generally, the shareholder is required to present the share certificates to register in a company's register of shareholders. Unless the holder of ADRs is registered as a shareholder in a company's register of shareholders, it would be necessary to seek redress for violations of rights through the entity that put the program together.

## VII. Corporate Governance Code

In Japan, no code of conduct or corporate governance code has been adopted by the main stock exchange or government.

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<sup>7</sup> *Where the depositary is registered with the central clearing system of Japan, its customers could be registered with the system and obtain all of the rights of a shareholder. However, in practice, the system of registration only extends to Japanese banks and financial institutions; thus the U.S. institution that established the depositary program would be registered with the central clearing system (as a customer of a Japanese institution), not the individual ADR holder.*





Asia

South Korea

# South Korea

This memorandum was prepared based upon information provided by Shin & Kim of Seoul, Korea and addresses the law and general corporate practices of limited liability companies listed on the Korean Stock Exchange (“KSE”) or registered on the KOSDAQ. The information contained herein is based on the Korean Commercial Code (“Code”) and the Securities and Exchange Act (“SEA”) and is current as of July 1, 2000.

## I. Rights of Shareholders<sup>1</sup>

### A. Share Ownership

Korean companies are permitted to issue different classes of shares with varying rights to voting, dividends, and company assets.

### B. Voting Rights of Shareholders

The Code, in conjunction with a company’s articles of incorporation, dictates shareholder voting rights. Each class of shares follows the one-share, one-vote general rule. However, companies authorized by their articles of incorporation to do so may issue non-voting preferred stock not to exceed 25% of the company’s total issued and outstanding shares. Although preferred stock generally is non-voting, preferred stockholders are entitled to vote in a shareholders meeting following a resolution by shareholders not to pay preferred stockholders their specified dividend. Preferred shareholders do not have a right to vote on other matters affecting the rights of the preferred shareholders. However, preferred shareholders may be permitted by the company to vote on other matters; there is no express prohibition against preferred shareholders voting on a matter that affects their rights.<sup>2</sup>

Shareholder rights may be suspended under certain circumstances. Each shareholder is precluded from voting more than 3% (or a lower percentage if specified in the articles of incorporation) of the total shares outstanding in the election of the company’s audit firm. Shareholdings and voting rights also are restricted in entities specified by the government as “public companies.”<sup>3</sup> Moreover, certain acts

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<sup>1</sup> Information provided in this section is based principally on the Code.

<sup>2</sup> If preferred shareholders are given the ability to vote at a meeting, quorum and voting requirements for general shareholders meetings would apply. There are no special quorum or voting requirements for preferred shares.

<sup>3</sup> As of the date of this summary, only two “public companies” had been designated: Korea Electric Power Corporation and Pohang Iron and Steel Corporation.

and regulations place limitations on shareholdings under certain circumstances, and the voting rights of shares held in excess of these limitations may be suspended.<sup>4</sup>

Cumulative voting is permissible in the election of directors provided that it is not prohibited by the company's articles of incorporation and shareholders, owning in the aggregate a minimum of 3% of the company's voting stock, request cumulative voting at least seven days prior to the meeting at which directors are elected.

The Code does not specifically restrict the voting rights of foreign shareholders. However, the SEA limits foreign ownership in the two companies it has designated as "public companies," and certain official acts may contain restrictions on foreign ownership and voting rights.

## C. Shareholders Meetings

### 1. Record Date

The Code specifies that a company may set a record date for use in conjunction with the "shareholder register closing system" to determine shareholder ownership rights as of a particular date. The shareholder register closing system precludes new entries on the shareholder register for a certain period of time, limiting shareholder rights for purposes of the meeting to those shareholders listed on the register at the time of the closing. The Code directs that the record date for determining share ownership be within three months of the date voting rights are exercised, and that public notice of the record date be given at least two weeks prior to the record date, unless the record date is designated in the articles of incorporation. In practice, companies generally designate in the articles of incorporation that the last day of the fiscal year be set as the record date and that the shareholder register be closed from the day following record date until the date of the annual meeting (four to six weeks).<sup>5</sup> Only shareholders of record may vote at shareholders meetings, but shares may be freely traded after the record date and prior to the shareholders meeting. There is no legal restriction on share trading even when a company combines the record date system with the shareholder register closing system. The shares can be transferred by delivery of share certificates and by book transfer in the case of shares deposited with the Korea Securities Depository ("KSD").

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- <sup>4</sup> *Shareholder rights also may be suspended under the following circumstances: (1) When Company A owns more than 10% of the total issued and outstanding shares of Company B, Company B loses its voting rights for any shares it owns of Company A; (2) Shares of an individual or entity with a special interest in a particular resolution; (3) Shareholders owning more than 5% of a company listed on the KSE or registered on KOSDAQ found to have violated disclosure requirements under the SEA are restricted from voting on the portion of those shares in excess of 5% for a six month period; (4) The voting rights of shareholders found to have obtained shares in violation of tender offer rules under the SEA are suspended for six months; and (5) The voting rights of a domestic affiliated company whose parent is engaged in the insurance or securities business and belongs to the same conglomerate under the Monopoly Regulations and Fair Trade Act are suspended.*
- <sup>5</sup> *A company is free to set its record date before or after the shareholder register is closed. However, because no new entries can be made on the books after the register is closed, a record date set after the closing of the register will not necessarily reflect actual ownership interests as of the record date.*



## 2. Notice Requirements for Shareholders Meetings

The Code generally requires companies to give notice to shareholders by mail two weeks prior to all shareholders meetings. However, in the case of bearer-type shares, the meeting is announced publicly in accordance with the procedures specified in the company's articles of incorporation. Additionally, KSE-listed and KOSDAQ-registered companies may notify holders of less than 1% interest in the company of shareholders meetings by public announcement. This public announcement should be made in at least two daily newspapers, and at least twice in each newspaper. Notices generally are not required to be published in languages other than Korean. However, subsidiaries of foreign companies and joint-venture companies with foreign entities often require in their articles of incorporation that certain notices be published in other languages and circulated to certain investors. There are no special notice requirements for companies that have taken affirmative actions to qualify their shares for trading outside of Korea, as establishing, for example, American Depositary Receipt ("ADR") or Global Depositary Receipt ("GDR") programs.

The Code requires that the notice include identification of the entire agenda, date, and location of the meeting. In addition, KSE-listed and KOSDAQ-registered companies are required to include a business summary in their notice that describes the status of operations and any supporting documents for the agenda. The business summary must be made available for shareholder inspection at the company's main office and branches, the transfer agent's office, the Financial Supervisory Commission ("FSC"), the KSE, and the Korean Securities Dealers Association, as applicable.

Any item voted on without proper notice may be nullified, unless all shareholders attend the meeting and unanimously consent to vote on the item. If notice is not given in a timely manner, the Code specifies that a shareholder, director, or auditor may file a legal action with the court to repeal all resolutions passed at the shareholders meeting. The appeal must be filed within two months of the date of the shareholders meeting.

## 3. Shareholder Proposals

The Code specifies that shareholders who own, in the aggregate, a minimum of 3% of the company's voting stock may submit a proposal to the board of directors ("Board") to be included on the agenda. Shareholders of KSE-listed and KOSDAQ-registered companies must hold an aggregate of 1% of the company's voting stock continuously for a six-month period in order to submit a proposal. The minimum aggregate shareholding requirement for companies capitalized with 100 billion Won or more is 0.5% of the voting stock for a period of six months. Proposals must be submitted in writing to the board at least six weeks prior to the shareholders meeting. The Board is required to include the proposal in the next meeting agenda so long as it does not conflict with any law or the company's articles of incorporation. However, the Board of KSE-listed and KOSDAQ-registered companies may decide not to include the proposal in the next meeting agenda if: (1) the proposal is not an item appropriate for a shareholders meeting; (2) the proposal is identical to an item voted on and rejected at a shareholders meeting within the past three years; (3) the proposal relates only to a shareholder's personal distress; (4) the proposal concerns a merger, spin-off, split-off, transfer or acquisition of business, or a new stock issuance that does not allow for the pre-emptive rights of shareholders; (5) the proposal relates to the rights of minority shareholders as set forth under the Code; (6) the proposal relates to removal

of a director or an internal auditor within his appointed term; or (7) the proposal concerns an impracticable, useless, inappropriate, clearly incorrect or defamatory item.

The Code further specifies that shareholders owning, in the aggregate, a minimum of 3% of the company's voting stock are qualified to call special meetings. Shareholders who in the aggregate have held, for at least six months, a minimum of 3% of a KSE-listed or a KOSDAQ-registered company's voting stock also are qualified to call special meetings. Shareholders of companies with a total capital of 100 billion Won or more are only required to hold a minimum of 1.5% of the voting stock for a minimum of six months. Shareholders must submit to the Board a written agenda stating the purpose of the meeting in order to call a special meeting of shareholders. Shareholders may secure court permission to call a special meeting directly if the Board fails to process the request in a timely manner.

Shareholders may nominate candidates for the Board of a company by exercising their right to submit a proposal or call a special meeting. Shareholders do not have a special right to remove directors, but they may submit a proposal to do so as an item to be included in a shareholders meeting, as long as the company is not KSE-listed or KOSDAQ-registered. If a vote to remove a director fails and the director has engaged in an illegal practice or has acted in grave violation of the articles of incorporation of the company, shareholders representing, in the aggregate, a minimum of 3% of the company's voting stock may petition the court for review of the proposal within one month of the failed vote. Shareholders of KSE-listed or KOSDAQ-registered companies representing a minimum of 0.5% of the company's voting stock, held continuously for at least six months, also are qualified to petition the court for review. The minimum continuous ownership for a company with total capital of 100 billion Won or more is 0.25% of the voting stock.

The minimum ownership requirements to call a shareholders meeting or submit a proposal as an agenda item are based on holdings of voting rights. However, the minimum requirements to request that a director be removed for engaging in illegal activity or a grave violation of the articles of incorporation are based on total shareholdings of voting and non-voting shares. Generally, holders of depositary receipts cannot call a shareholders meeting or submit a proposal for an agenda item. The depositary institution is deemed the owner of shares issued through depositary receipts, and therefore shareholder rights must be exercised through the depositary institution.

#### 4. Proof of Shareholder Status

Shareholders must be registered in the company's share registry to vote shares at a meeting. When shares are registered in the name of the KSD for the benefit of the actual owner, the beneficial owner may vote directly.<sup>6</sup> Owners of depositary receipts may not directly exercise their voting rights, but must do so through depositary institutions in accordance with their depositary agreements. Physical possession of shares is not necessary if the shares are registered in the shareholder's name. If the shares are bearer-type, physical possession would be required; however, in practice bearer-type shares are rarely issued.

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6 A "beneficial owner" is the owner of a security registered in another's name (such as in the name of a broker).

Shares may not be held in the name of a nominee, such as a brokerage firm or a custodian. The Code directs that companies only recognize the owners of shares that are listed in the shareholder registry, except when: (i) a trustee is deemed the titleholder of shares and is registered as such in the shareholders registry (the trustee exercises voting rights on behalf of the beneficiary); and (ii) the KSD appears in the shareholder registry for shares deposited in it. In the latter instance, the KSD provides the company with a list of its beneficial owners upon notification of a record date or a shareholder register closing date and, based on this list, the company prepares a beneficial owner registry that enables those whose names appear in the registry to exercise all voting rights.

## 5. Attendance at Shareholders Meetings

There are no express limitations on the attendance of shareholders at annual and special shareholders meetings. A company may not restrict shareholders who appear in the shareholders register (or the beneficial owner registry, as the case may be) from attending shareholders meetings and exercising their voting rights. Whether or not a company may allow a beneficial owner whose name has not been recorded on the shareholders register (or beneficial owner registry, as the case may be) to attend the shareholders meetings and to exercise voting rights, will depend on whether or not a record date has been established by the company for a specific shareholders meeting. If a record date has been established (which is the practice), the company will be bound by such record date and may not recognize voting rights of beneficial owners who do not appear in the shareholders register as of the record date. However, if a record date has not been established, those who are shareholders as of the meeting date may exercise voting rights, as may beneficial shareholders. In practice, companies do not restrict beneficial owners from attending annual or special shareholders meetings.

Shareholders only are required to present proof of their identity at shareholders meetings. In practice, most companies distribute an attendance card that is presented along with the notice of the meeting. However, presentation of this card is not necessary. The Code requires that proxyholders present evidence of the proxy at the meeting. A company's articles of incorporation typically also require that evidence of the proxy be submitted. The proxy form is not the exclusive form of evidence, but such document is typically notarized or a certification of registered seal is attached as evidence that it has been duly prepared by the shareholder. Representatives of corporate entities are required to present a form of identification proving such person's position with the company and a power of attorney authorizing the representative to vote on behalf of the company. Foreign language documents generally are accompanied by a translation, as companies are not required to recognize foreign language documents.

There are no specific laws that address a shareholder's right to ask questions at a shareholders meeting, but such right is recognized by the legal community. However, the Chairman of a meeting may order the removal of any person who attempts to interfere or disturb the proceedings of a meeting. Similarly, the Chairman has the discretion to limit a shareholder's participation in an effort to maintain order. There are no specific rules regarding a shareholder's ability to be accompanied to a meeting by a translator. The "Model Rules for

Shareholder Meetings of Listed Companies” recommended by the Listed Companies Association state that translators should be able to attend shareholders meetings with the company’s approval.<sup>7</sup>

## 6. Proxy Voting

The Code states that a shareholder may exercise voting rights by appointing a representative proxy to vote his shares at a shareholders meetings. In order to vote by proxy, the representative to whom voting authority is delegated must attend the shareholders meeting in person, and as previously discussed in Subsection 4, such representative must submit documents evidencing his authority to vote. A proxyholder does not have the right to delegate voting rights to a third party. Once a foreign shareholder designates a standing proxy, persons other than such standing proxy are prohibited from exercising voting rights. Foreign shareholders, like domestic shareholders, may exercise voting rights by attending the meeting in person or through a representative proxy. There are no nationality restrictions on the qualifications for a proxy but some companies place proxy limitations in their articles of incorporation. One representative proxy may act on behalf of a number of shareholders, and such proxy may vote in favor of a proposal on behalf of certain shareholders and against the same proposal on behalf of others.

## 7. Quorum

Korean law does not require that a quorum of outstanding shares of a company be present in order for business to be conducted at a shareholders meeting. However, a company may include a provision in its articles of incorporation specifying a quorum. In practice when companies do require a quorum, the Chairman of the meeting typically addresses such issue. If a quorum is not present, the Chairman of the meeting is obligated to adjourn the meeting and call another one.

## 8. Voting and Supermajority Provisions

There is no procedure for casting votes by mailing in a proxy form; however, shareholders may vote by mailing in a proxy form if authorized by a company’s articles of incorporation. If a shareholder who has more than one vote intends to vote his shares inconsistently (e.g., three shares for a proposal and two shares against the same proposal), such shareholder is required to notify the company of his intent and to state the reason in writing at least three days prior to the shareholders meeting. Companies may reject such voting practices unless the person giving such notice is holding the shares to be voted in trust or on behalf of another person.

The law does not address whether or not shareholders may call for a vote on a matter raised at the meeting that was not originally included in the notice prior to the shareholders meeting. It is generally understood that items not included in the notice may not be voted on, and

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<sup>7</sup> *The Model Rules have not been adopted widely.*

the proposals that shareholders may submit at the meeting are limited to those related to the proceedings and to revising minor matters on agenda items included in the notice. According to the Model Rules for Shareholder Meetings of Listed Companies, a shareholder may propose that an agenda item be revised to the extent the revision does not materially alter the item. The proposed revision must be approved by all shareholders present at the meeting.

Unless specified by law or the articles of incorporation of a company, ordinary resolutions are adopted by an affirmative vote of a majority of votes present at the shareholders meeting, such votes representing at least one quarter of all issued and outstanding voting shares (“Ordinary Resolution”).<sup>8</sup> Voting requirements to adopt an Ordinary Resolution may be made more demanding by the articles of incorporation.<sup>9</sup>

According to the Code, measures that fundamentally alter the company must be adopted by Special Resolution, or two-thirds of the shares present at the shareholders meeting (representing a minimum of one-third of all issued and outstanding voting shares). These measures include the following: amending the articles of incorporation; transferring a substantial part of the business; leasing a substantial part of the business or delegating management control; executing, amending or terminating an agreement that accounts for a substantial amount of the company’s profitability, or other agreements of similar nature; acquiring another company’s business; dismissing a director or an auditor; issuing new shares below par value; reducing paid-in capital; dissolution of the company; approving merger agreements; and granting stock options. A company’s articles of incorporation may require that additional matters be approved by Special Resolution, or that even more restrictive voting requirements be met.<sup>10</sup>

## 9. Voting Tabulation and Results of Shareholders Meetings

No specific law addresses the method of counting shareholder votes. Each company may establish a voting method in its articles of incorporation or the rules of the shareholders meeting. According to the Model Rules for Shareholder Meetings of Listed Companies, voting may be conducted by a standing vote, a show of hands, or other method to be determined by the Chairman of the meeting unless a certain method has been specifically adopted by resolution. Unless otherwise specified in the articles of incorporation or the rules of the shareholders meeting, any mechanism may be applied in counting shareholder votes as long as it is objective and reasonable. A shareholder’s

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<sup>8</sup> *There have been reports of shareholders’ votes being overruled by the chairman of a shareholders meeting. In the event that votes are illegally tabulated, shareholders may in certain instances seek legal recourse. See Section C.9 below.*

<sup>9</sup> *However, there is a split among legal commentators as to the extent such increase is permitted: one view is that there is no limit; the other view is that the increase is limited to an affirmative vote of two-thirds of the shares present at the meeting where at least 50% of the issued and outstanding voting shares are present. In practice, certain joint venture companies and closed companies have required a supermajority for the adoption of certain resolutions.*

<sup>10</sup> *However, as with the degree to which voting requirements may be increased, there is a split among legal commentators as to the extent measures requiring a supermajority vote may be additionally established by inclusion in the articles of incorporation.*

ability to oppose a certain method of voting is dependent on the company's articles of incorporation and its rules for the shareholders meeting. If there are no special provisions addressing this issue, an alternative method may be adopted by resolution.

Voting conducted by a show of hands, a standing vote, or other public vote must be tabulated in order to determine whether a resolution has been adopted. Although no specific law requires that votes be tabulated, tabulating the votes is considered to be a basic requirement of a resolution of the shareholders meeting. Therefore, if a tabulation of the votes has not been conducted after a vote has been held, any shareholder who was present at such meeting, or the shareholder's agent, may call for a tabulation, and the Chairman has a duty to tabulate the votes. Once a resolution is adopted by shareholders, it becomes effective and no separate verification process is required. In practice, after a vote has been conducted, the Chairman announces the results of the tabulation. Shareholders cannot request independent verification of votes, but if the tabulation was conducted in an illegal manner (e.g., the Chairman announced an adoption of a resolution even though the votes required for adoption were not achieved), shareholders may initiate a suit to cancel such resolution within two months from the date of such resolution.

The Code directs that the results of shareholders meetings be recorded in the minutes of the meeting. The minutes contain a record of the resolution proceedings and their results, and the Chairman and directors present at the meeting either sign or place their seal on the minutes. The minutes of the shareholders meeting are maintained at the company's headquarters and branches, and shareholders may inspect or make copies of such minutes at any time during normal business hours. Although the current law is silent as to the required procedures for inspecting or making copies of the minutes of a shareholders meeting, a company may in practice, for the purpose of determining the qualification of a requesting person, require that a written request in a certain prescribed form be submitted together with other documents.

The minutes of the shareholders meeting must contain a summary of the proceedings from the time of commencement until the adjournment of the meeting and the results of voting for each proposal. Therefore, the minutes of the shareholders meeting must include the time of commencement, a summary of the proposals and discussions regarding such proposals, the voting method, voting results and the time the meeting is adjourned. The minutes also must include other basic information such as the name of the shareholders meeting; date and place of the meeting; total outstanding shares, number of shareholders present and the number of voting shares present; and number of directors and statutory auditors present. If the financial statements have been approved at the meeting, the balance sheets contained in such financial statements must be publicly disclosed. Also, although not required by law, some listed companies send notice to shareholders informing them of the results of the shareholders meeting.

## D. Rights of Minority Shareholders in Corporate Transactions<sup>11</sup>

Measures that result in a fundamental change in the company are subject to Special Resolution, which must meet more stringent requirements for adoption compared to Ordinary Resolutions. The majority of material transactions are subject to Special Resolution.

Appraisal Rights. Dissenting shareholders have appraisal rights for certain matters subject to Special Resolution. Shareholders may notify the company of their disapproval of certain proposed transactions prior to the shareholders meeting (for short-form merger, within two weeks of the date of public announcement or notice of such merger) and may request in writing that the company, within 20 days of the approval of such resolution, purchase the shares owned by such shareholder. The company is obligated to honor the shareholder's request. Appraisal rights apply to the following matters: (i) assignment of a substantial part of the business; (ii) delegation of management control; (iii) execution, amendment, or termination of an agreement that accounts for all of the company's profitability, or other agreements of similar nature; (vi) acquisition of another company's business in whole; or (v) approval of a merger agreement.

For unlisted companies, the share price is determined through negotiation between the shareholder and the company, and if an agreement cannot be reached, an accounting professional selected by the representative director determines the share price. However, if the company or shareholders representing more than 30% of the total shares requesting purchase reject the professional's share price, the court may be petitioned within 30 days (of the submission of the professional's price) for a binding court determined price. In the event a listed company and its shareholders representing 30% of the total shares fail to reach an agreement, a share price will be determined by applying a statutory formula based on the market value. If the company or the shareholders requesting purchase rejects the share price, the FCS will adjust the share price. In the event the share price adjusted by the FSC is not accepted, the court finally and conclusively will determine the share price.

Injunction/Claims for Damages. In the event a director violates the law or the articles of incorporation and threatens irreparable harm to the company, a shareholder who holds a minimum of 1% of the total issued and outstanding shares may request that an injunction be issued against such director. In cases of a company listed on the KSE or registered on the KOSDAQ, any shareholder with a minimum of 0.5% (for companies with assets totaling not less than 100 billion Won, the threshold is 0.25%) of the total issued and outstanding shares for a consecutive period of at least six months may request that an injunction be issued. In the event a director fails to perform his duty as a result of malice or gross negligence and causes shareholders to incur damages, injured shareholders may claim damages against the offending director. There is no minimum shareholding requirement for shareholders to claim such damages.

Other Limitations on Rights. The law specifies circumstances where the rights of shareholders may be limited. For example, a company may specify in its articles of incorporation that the preemptive rights of shareholders be granted to a third party and not the existing shareholders. Additionally, a company operating under extreme conditions (e.g., in the case of a faltering company, which enters the

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11 Information in this section is based principally on the Code.

corporate reorganization process) may require that a shareholder's pre-emptive right or right to distribution be limited by a reorganization plan approved by the court.

## E. Transferability of Shares

Share transfers only may be restricted by the articles of incorporation subject to limitations in the Code. There are no laws that specifically restrict the transfer of minority shareholdings. Shareholders may be required to obtain board approval prior to transferring shares. In the event the board does not approve the proposed transfer of shares, the company is obligated to either purchase the shares or designate a party to whom the shares are to be transferred. The Code contains detailed provisions on the procedures for transferring shares. KSE-listed and KOSDAQ-registered companies are prohibited from restricting the transfer of shares as a condition of listing or registration. The FSC's Regulation on the Trading of Securities by Foreigners provisions require that foreigners trading in KSE-listed or KOSDAQ-registered securities do so on the KSE or the KOSDAQ.

## F. Accounting

The Code requires that directors of a company maintain publicly disclosed accounting records for public inspection, beginning one week prior to the annual shareholders meeting, for a period of five years at the company's headquarters and for a period of three years at the company's branch offices. These records include financial statements, the annual report, and the audit report. Moreover, companies subject to the Act on Outside Auditor for Stock Corporations are required to maintain for inspection, in addition to the above documents, an auditor's report on the financial statements. Shareholders may inspect such documents at any time during normal business hours and may request, subject to a fee, that the company provide the shareholder with copies of such documents. Once the financial statements have been approved at the shareholders meeting, the balance sheet contained therein must be made public immediately by the directors.

Shareholders holding a minimum aggregate of 3% of the total issued and outstanding shares are entitled to inspect or make copies of the company's accounting books and documents. The officers of the company may refuse the request if they determine that the request is being made unduly. In the case of companies listed on the KSE or the KOSDAQ, shareholders of a minimum of 1% (or 0.5% for companies having total capital of at least 100 billion Won as of the most recent fiscal year-end) of the total issued and outstanding shares for the past six months are entitled to inspect or make copies of the company's accounting books and documents. Companies listed on the KSE or KOSDAQ must submit to the FSC, KSE (in case of KSE-listed companies), and the KOSDAQ (in case of KOSDAQ-registered companies) annual reports containing financial information within 90 days of the fiscal year-end, and semi-annual and quarterly reports within 45 days of the end of the periods. These documents are maintained at the FSC, KSE, and KOSDAQ and are available for public inspection.

All shareholders have the right to request an accounting. However, the depositary must make the request for shares held in depositary receipts. There are no special procedural requirements for a shareholder to inspect the company's financial statements or the various documents kept on file with the FSC, KSE, or KOSDAQ. However, shareholders must state the reason for such inspection in a written request to the representative director of the company to inspect or make copies of the company's accounting books and documents.



Companies may be fined up to 5 million Won and shareholders may initiate a court action against the company for failure to grant a shareholder's request to an accounting.

## G. Inspection Rights

The directors of a company must keep the articles of incorporation and minutes of shareholder meetings at both the company's headquarters and branch offices, and the shareholders registry, bond registry, and the minutes of the Board at the company's headquarters. Shareholders may inspect and make copies of these documents at any time during normal business hours. In addition, the directors of the company must, beginning from one week prior to the annual shareholder meeting, keep the financial statements, annual report, and the audit report for a period of five years at the company headquarters and a copy of such documents for a period of three years at the branch offices. Shareholders may, during normal business hours, inspect and, for a certain fee determined by the company, request the company to issue a certified copy or extract of these documents.

If there is cause to believe that the company is involved in activities which are illegal or in violation of the company's articles of incorporation, shareholders holding a minimum aggregate of 3% or more of the total number of issued and outstanding shares may petition the court for the appointment of an examiner to conduct an inspection of the company.<sup>12</sup> The examiner will report to the court the results of its inspection and the court will, if deemed necessary, order the company's representative director to convene a shareholders meeting. At the shareholders meeting, based on the result of the examiner's inspection, the necessary actions including the dismissal and appointment of directors may be taken.

## II. Payment of Dividends

The Code currently recognizes periodic and interim dividends. Shareholder entitlement to dividends is based upon the same procedures (*i.e.*, the record date or the closing of the shareholder register or the combination thereof) as those used to determine voting rights at shareholders meetings. In practice, many companies set the record date as of the last day of the fiscal year, close their shareholder registry as of the fiscal year-end through the shareholders meeting date, and distribute dividends to those registered as shareholders as of the record date. A final determination on periodic-dividend amounts is made at the general shareholders meeting.

The Code requires that notice for a shareholder meeting include identification of the entire agenda for the meeting. A resolution on dividend payment that is a part of the agenda for the meeting will appear in the meeting notice. When a KSE-listed or KOSDAQ-registered company decides to pay dividends in stock rather than in cash, it must publicly announce the decision through the KSE and the KOSDAQ, respectively.

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<sup>12</sup> For KSE-listed or KOSDAQ-registered companies such request may be made by shareholders holding continuously for the past six months 3% (or 1.5% for companies having total capital of at least 100 billion Won as of the most recent fiscal year-end) or more of the total number of issued and outstanding shares.

Periodic dividend distributions require approval of the Board and shareholders, while interim dividend distributions require only Board approval. The financial statements may be revised at the shareholders meeting, making dividend distribution dependent on the final outcome. In the case of preferred stock, because a fixed dividend payout ratio is determined at the time of issuance, a company is required to distribute dividends to preferred stockholders each settlement term, to the extent that the company has any retained earnings for such term.

The dividend record date must be announced publicly at least two weeks in advance, unless the record date is set by the articles of incorporation. Periodic dividends must be paid within one month of shareholder approval of payment, and interim dividends must be paid within one month of the resolution on payment of such dividends by the Board. However, at the shareholders meeting or the meeting of the Board approving the distribution, a payment date outside of the one-month period may be established. There are no special notice requirements on the payment dates, but most companies mail notice to each shareholder after the general shareholders meeting.

All shareholders, whether majority or minority, domestic or foreign, receive dividends based on the number of shares they own. Although there may be differences in dividend amounts based on different rights attached to different types of stock (such as preferred stock or subordinated stock), dividend amounts on the same types of stock generally cannot differ.

Dividend payment procedures differ based on direct and depositary ownership. Shareholders who directly hold the stock certificates receive dividend payments by visiting the dividend distribution office during a certain time period as specified in the notice sent by the company. For shares deposited with the KSD, dividends are paid directly to the KSD by the company, and the KSD in turn distributes dividends to shareholders.

Neither the Code nor the Foreign Exchange Transaction Act restricts currency of payment for dividends and, therefore, dividends may be paid in local currency (Won) and foreign currencies.

Cumulative dividends are permitted in accordance with the cumulative distribution term expressly prescribed in the articles of incorporation and approved by the board.

### III. Affiliated Transactions<sup>13</sup>

The board must approve direct or indirect transactions between directors and a company, but approval is not required for officers or other employees of the company. However, in the event the company is harmed by transactions with officers or other employees, the director in

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13 Information in this section is based principally on the Code and on the Monopoly Regulation and Fair Trade Act.

charge of those transactions may be liable for damages. There also are restrictions on transactions with affiliates under the Monopoly Regulation and Fair Trade Act.<sup>14</sup>

There are no general restrictions on percentage stock ownership of officers, directors, or employees of a company. However, an officer, director, or employee of a KSE-listed or KOSDAQ-registered company is prohibited from engaging in short-term sales of company shares and is liable to pay to the company, upon the company's request, any "short-swing" profits. In addition, certain defined insiders such as an officer, director, employee, or a beneficial owner of a significant percentage of shares, or someone with insider status within the last year, is prohibited from trading or causing others to trade the company's shares on the basis of material nonpublic information that was obtained through such insider's position. Violators of this rule are subject to criminal and civil liabilities.

Shareholders may request that a company cease stock issuances that are grossly unfair and likely to cause existing shareholders harm. Shareholders that purchase shares at a substantially unfair subscription price through collusion with a director are required to reimburse the company the difference between the price paid and the fair subscription price. Therefore, an issuer may not sell stock to anyone, including its officers, directors, or employees at a price substantially lower than the current market price. In the case of a KSE-listed or KOSDAQ-registered company, the issuer may not sell stock at a price lower than the current market price.

In order to issue stocks to officers, directors, and employees of a company, the company must have an enabling provision on third party allotments (*i.e.*, a provision that operates to exclude shareholders preemptive rights) in its articles of incorporation, or the company must adopt a Special Resolution. The Board determines the specific terms of the issuance subject to liability for unfair issue prices. Companies may specify in their articles of incorporation or through a Special Resolution that stock options with advantageous exercise prices be granted to its officers, employees, or directors who have made substantial contribution to the company or who potentially may make such contribution to the company. A Special Resolution is required for each grant. Generally, the exercise price of a stock option may not be lower than the market price.

An officer, director, or a beneficial owner of a significant percentage of shares of a KSE-listed or KOSDAQ-registered company is required to disclose to the KSE or the KOSDAQ, respectively, within ten days of becoming such an officer, director, or a beneficial owner of a significant percentage of shares, his direct and indirect ownership in the company. Any quantity change in the ownership must be reported to the Securities Futures Commission ("SFC") and the KSE (in the case of a KSE-listed company) or the KOSDAQ (in the case of a

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<sup>14</sup> Specifically, if (1) there exists a practice of unfairly supporting a specially related person or another company by providing it with temporary accounts, loans, manpower, real estates, securities, or intellectual property rights without compensation or on substantially advantageous terms; and (2) as a result, the supportee occupies an advantageous status in a trade area, attains special advantages in competition, increases the possibility of excluding competitors, by delaying the supportee's exit from the market or of blocking entry into the market, then the support practice is deemed to be an unfair support, and the supporter would be subject to a fine.

KOSDAQ-registered company) by the tenth of the month immediately following the month the change occurred. The disclosed information becomes public when it is submitted to the SFC, KSE, or KOSDAQ.

## IV. The Role of Local Regulators and Stock Exchanges in Enforcing Shareholder Rights

### A. Responsibility of the Board of Directors

Under the Civil Code a director owes a fiduciary duty to the company and its shareholders to exercise the care of a prudent supervisor in good faith, with due diligence in the interests of the company and in compliance with the law and the company's articles of incorporation. The duty of care and the duty of loyalty to the company create a duty to protect the interest of all shareholders.

Directors are jointly and severally liable to the company for losses as a result of the director's actions or failure to act in violation of the law or the articles of incorporation. When this type of violation results from a board resolution, those directors who voted in favor of the resolution are jointly and severally liable. Shareholders holding, in the aggregate, a minimum of 1% of the company's issued and outstanding shares may make written request that the company bring action against those directors allegedly at fault. Shareholders may bring their own action in the event the company fails to bring an action within 30 days. In the case of KSE-listed or KOSDAQ-registered companies, continuous ownership of 0.01% of the issued and outstanding shares for six months is required to qualify to bring such an action. Minority shareholder derivative suits recently have been brought against the management of failing financial institutions. Judgment recently was rendered against the management of a bank for its decision to make a large loan to a company with unsound financial structure.

### B. Enforcement of Rights by Local Regulators

The Code does not require specifically regulators to protect the interests of shareholders. However, the Code protects the interests of shareholders indirectly by imposing criminal penalties and fines on the company and its management for violating Code provisions designed to protect shareholder rights. Violations of the securities laws and FSC orders may be made public or prosecuted. Moreover, the Act on the Creation of Financial Supervisory Agency authorizes the FSC to supervise the securities market and protect investors.<sup>15</sup>

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<sup>15</sup> *The FSC may issue cease and desist orders, warnings, suspensions of business operation, and suspensions or cancellation of licenses. The FSC also may require that banks or companies reduce salaries, issue warnings, or suspend or terminate the employment of officers, directors, or certain employees. The FSC also may impose various punitive measures for individual violations. The KSE may announce publicly non-compliance of disclosure requirements in its daily bulletin and may notify the FSC of such non-compliance. Moreover, in case of intentional, habitual, or grossly negligent non-compliance, the KSE may repeal the company's listing.*

### C. Enforcement of Rights through the Judicial System

The Code offers several legal remedies to shareholders in the event shareholder rights are violated.

Each shareholder holding one or more shares may initiate legal action as a result of improper shareholder resolutions. If (i) the procedures for the convocation of a general meeting, or the manner of a resolution are in violation of law or the articles of incorporation, or are substantially unfair, or (ii) the substantive contents of a resolution are contrary to the articles of incorporation, a shareholder may file an action for revocation of the resolution within two months from the date of such resolution. A shareholder also may bring an action to affirm the nullity of a resolution on the grounds that the contents of the resolution adopted at a general meeting are contrary to law, social order, or the basic structure of stock corporations. An action also may be brought to affirm the non-existence of a resolution as a result of material defects in the meeting procedures or in the method of resolution. In the event an improper resolution is adopted at a general shareholders meeting where certain interested shareholders are prevented from voting, and the resolution would not have been adopted if the interested shareholders had exercised their voting right, the interested shareholders may file an action for revocation or alteration of such resolution within two months from the date of such resolution.

Shareholders may request that an action be suspended. If irreparable damage to the company is threatened as a result of a director's violation of law or the articles of incorporation, a shareholder who owns at least 1% of the company's issued and outstanding shares can bring an action on the company's behalf to suspend any action by such director. In the case of a company listed on the KSE or KOSDAQ, six months continuous ownership of 0.5% of the issued and outstanding shares is required to bring such an action; if the company has a total capital of 100 billion Won or more as of the most recent fiscal year-end, the ownership requirement is 0.25% of the issued and outstanding shares.

Each shareholder, holding a minimum of one share, may bring an action against the company to stop the issuance of new shares in a manner contrary to the law or the articles of incorporation, or which are significantly unfair, and may disadvantage any shareholders. If the new shares already have been issued in such a manner, the shareholder may bring an action to nullify the issuance within six months of such issuance.

Each shareholder, holding a minimum of one share, may bring an action to nullify a merger on the basis of procedural or substantive defects in the merger within six months of the date of such merger.

In the event a director violates the law or articles of incorporation in connection with his duties and the removal of a director is rejected at a general shareholders meeting, shareholders holding a minimum of 3% of the total issued and outstanding shares may petition the court for removal of the director within one month of the date of the general shareholders meeting. In the case of a company listed on the KSE or KOSDAQ, six months continuous ownership of 0.5% of issued and outstanding shares is required to bring such an action; the ownership requirement is 0.25% for companies with total capital of 100 billion Won or more.

Shareholders holding, in the aggregate, a minimum of 10% of the total issued and outstanding shares may petition the court for dissolution of the company when the business operations appear to be in continuous deadlock creating or threatening irreparable injury to the company. Shareholders also may seek dissolution under circumstances where the company's existence is threatened by improper management or disposition of the company's property.

Depository institutions must bring action on behalf of beneficial owners holding depository receipts.

When a director or an auditor violates the law or the articles of incorporation, or otherwise neglects his duty, he is liable for any resulting loss to the company. However, when the company does not seek damage from such director or auditor, shareholders may bring a lawsuit in lieu of the company against such director or auditor. A shareholder who owns at least 1% of the company's issued and outstanding shares can, in writing, request that the company bring an action against such directors, and, if the company does not bring an action within 30 days, the shareholder can bring such action on its own. In the case of a company listed on the KSE or KOSDAQ, six months continuous ownership of 0.1% of the issued and outstanding shares is required to bring such an action; the ownership requirement is 0.5% for companies with a total capital of 100 billion Won or more. If there is a threat of irreparable damage, shareholders may immediately petition the court for action.

## V. Financial Information and Auditors

The preparation and information requirements of financial reports are governed by the Code, the Act on External Audit of Stock Corporations, and the SEA. According to the Code, for each settlement term, a company must prepare financial statements. These financial statements and their audit reports are available in the main office of the company for a period of five years beginning one week prior to the ordinary shareholders meeting; copies of the statements and reports are available in the branch offices of the company for a period of three years beginning one week prior to the ordinary shareholders meeting. Shareholders and claimholders of the company may inspect the statements and reports any time during regular business hours and may request copies of the statements and reports for a fee determined by the company.

In addition, KSE-listed and KOSDAQ-registered companies, and other companies required to perform an external audit pursuant to the Act on External Audit of Stock Corporations must make the audit and financial statements publicly available by submitting the report and the financials to the SFC and the Korean Institute of Certified Public Accountants ("KICPA"). The SFC, KICPA, FSC, KSE, and KOSDAQ then make materials available for public review and inspection for two years from the date of receipt. There is no specific requirement that the documents be published in the national language; however, in practice the documents are published only in Korean.

The Code requires companies to perform an internal audit, and the Act on External Audit of Stock Corporations requires an external audit be performed by a qualified accounting firm.<sup>16</sup> Internal auditors are elected by shareholders every three years. Shareholders are limited to voting up to 3% of the total issued and outstanding voting shares of the company in the election of the company's internal auditors. There is no specific requirement on the number of internal auditors, except that KSE-listed and KOSDAQ-registered companies with total capital of 100 billion Won or more as of the most recent fiscal year-end must have at least one permanent internal auditor. An internal auditor is free to resign, but removal of an internal auditor requires a Special Resolution of shareholders. External auditors are elected through the recommendation of the internal auditor or auditor selection committee, resolution of the board of directors, and approval of shareholders at a general shareholders meeting. External auditors are required to submit audit reports to the SFC and the KICPA. However, there is no requirement that the accountant disclose to regulators problems regarding the company in the event of the accountant's resignation.

## VI. Depositary Receipts/Nominee Rights

The depositary institution holds the rights of the beneficial owners and only the depositary institution may exercise the actual shareholder voting rights or attend shareholders meetings. For the holder of the depositary receipts to attend and vote at a meeting, the holder must withdraw the shares from the depositary receipt program and be registered as a shareholder in the shareholders' registry on the date of the meeting. Depositary receipt holders cannot exercise their rights individually. Rights only can be exercised through the depositary institution.

## VII. Corporate Governance Codes

Many organizations have issued codes of conduct to be followed by corporations, including the Korean Financial Supervisory Committee, the Korea Securities Dealers Association, the Korea Stock Exchange, and the Korea Securities Depository. In addition, the Committee on Corporate Governance, which is a non-governmental body established in 1999 comprised of members from business, academic, legal, and accounting backgrounds, has drafted a Code of Best Practice, which is a series of recommendations to the Korean government to amend laws to create a standard for corporate governance.

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<sup>16</sup> *There are current proposals to revise the Code to allow an audit committee consisting of a minimum of two-thirds outside directors to act as internal auditor. Similarly, the SEA may be revised to require that KSE-listed companies also form such audit committees. Currently, the internal auditor may not concurrently assume the office of a director, manager, or an employee of the company or its subsidiaries. Moreover, in the case of KSE-listed or KOSDAQ-registered companies, the following people are not qualified to act as an internal auditor of the company: minors; incompetents; individuals going through bankruptcy; convicted felons; certain persons sanctioned by the SEA within the last two years; significant shareholders of the company and their immediate family members; and individuals who have acted as officers, directors, or employees of the company within the last two years, or their immediate family members.*





Asia

Taiwan



# Taiwan

This memorandum was prepared based upon information provided by Lee and Li law firm of Taipei, Taiwan and addresses the law and general corporate practices of corporations issuing shares in Taiwan. The information is based on the ROC Company Law (“Act”) and is current as of July 1, 2000.

Companies issuing shares in Taiwan with a paid-in capital amount of at least \$200 million New Taiwan Dollars (NT) are subject to certain requirements of the Taiwan Securities and Exchange Law, even though they may not be listed on the stock exchange (“public issuing companies”). To be listed on the stock exchange, a corporation must meet the requirements of a “public issuing company” and also meet certain additional listing criteria. Unless otherwise specified, the information in this memorandum applies to both listed and non-listed companies.

## I. Rights of Shareholders<sup>1</sup>

### A. Share Ownership

The most common form for a company in Taiwan is a corporation issuing shares. These companies can issue special shares, in addition to common shares, that have different rights. The corporate articles specifically must set out the rights and obligations of each class of shares.

### B. Voting Rights of Shareholders

The Act generally requires that each shareholder receive one vote for each share of common stock. The voting rights of holders of common stock cannot be removed or restricted, except where one shareholder holds 3% or more of the total shares issued. In this case, the Act requires that the voting rights of the shares in excess of 3% be discounted by the corporate articles. The amount of the discount can vary, so that votes in excess of 3% might be discounted by 1% or by .01%, as dictated by the corporate articles. (This limit on voting shares in excess of 3% does not apply to the voting of shares held by a trust company, including shares held by a local sub-custodian bank on behalf of a foreign custodian bank or foreign shareholder.)

Where the corporate articles permit the company to do so, special stock may be issued with different voting rights from the common stock. However, neither common nor special stock can receive more than one vote per share. A company, if authorized by the corporate articles, can issue non-voting special shares.

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<sup>1</sup> Information provided is based on the ROC Company Law.

Taiwanese law generally does not provide for alteration of voting rights. However, the corporate articles can permit conversion of special stock carrying no voting rights into shares of common stock with voting rights. Common stock generally cannot be converted into shares of special stock. The Act requires cumulative voting for the election of directors and supervisors.<sup>2</sup>

The shareholders of non-voting special shares in a company are not entitled to receive notice of common shareholders meetings and are not entitled to vote at common shareholders meetings. However, if the company proposes to amend its corporate articles and the amendment would affect detrimentally the rights of the shareholders of non-voting special shares, these shareholders are allowed to vote. A meeting of non-voting shareholders would be called by the board of directors of the company. Alternatively, a meeting of non-voting shareholders could be requested in writing by a shareholder holding at least 3% of the total issued and outstanding shares for at least one year. If the board does not grant the request for a meeting within 15 days, the shareholders requesting the meeting may convene the meeting with prior approval of local authorities. The quorum requirements for a meeting of non-voting shareholders are the same as for a meeting of common shareholders.

The Act does not provide for different voting rights for foreign investors versus domestic investors, although foreign investors are subject to certain restrictions in buying and selling shares of public issuing companies (see Section I.E. below).

## C. Shareholders Meetings

### 1. Record Date

Taiwan does not use the term “record date” to determine eligibility of a shareholder to attend and vote at a shareholders meeting. Under the Act, registered shareholders listed on the shareholders’ roster as of a certain date are permitted to attend and vote at shareholders meetings. The shareholders’ roster is closed to new shareholders one month prior to the annual shareholders meeting and 15 days before a special shareholders meeting. The owner of the shares listed in the shareholder roster on the day before it is closed is the “shareholder” for purposes of attending and voting at the shareholders meeting. For owners of bearer shares, the share certificates must be surrendered to the company five days before the meeting.

Transfers of registered shares are not prohibited during the “lock-up” period of the shareholders’ roster. However, without making the entry into the shareholders’ roster, a share transfer is not effective against the company, and the transferor will be deemed the holder of the shares for purposes of attending and voting at any shareholders meeting.

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<sup>2</sup> *The supervisor is an individual shareholder who is elected by the other shareholders to serve as a representative. He acts somewhat like an in-house auditor and represents the shareholders’ interests to the board of directors.*

The term “record date” is used by the Taiwanese to determine other shareholders’ rights, such as obtaining dividend distributions. The record date is set by the board of directors. The Act requires that the shareholders’ roster be closed to new entries five days prior to the record date. Share transfers are not prohibited before or after the record date, but new entries to the shareholders’ roster are prohibited after the closure date. Thus, any transfer of shares during that five-day period is not effective against the company, and the transferor will be deemed the holder of the shares for purposes of collecting the dividend payment.

## 2. Notice Requirements for Shareholders Meetings

Notice only is required to holders of voting shares. Notice must be delivered to shareholders holding registered shares 20 days in advance of an annual shareholders meeting. The notice generally is delivered through the mail, unless the corporate articles specify otherwise. Notice must be published 30 days in advance of the annual shareholders meeting to notify holders of bearer shares. For a special shareholders meeting, notice must be delivered to shareholders holding registered shares ten days in advance and published for shareholders holding bearer shares 15 days in advance. The notice only is required to be written in Chinese.

The notice must include the agenda of the shareholders meeting. Items not listed on the agenda contained in the notice can be added at the meeting, except proposals for re-election of directors or supervisors, amendment of the corporate articles, and dissolution or merger of the company. These items must be listed in the agenda and cannot be proposed at a shareholders meeting. The Act does not require specifically the notice to state other matters, such as the time and place of a meeting, in addition to the agenda. However, in practice, the notice will state the date and location of the shareholders meeting.

No later than eight days prior to the meeting, a handbook for the shareholders meeting must be delivered to shareholders. The handbook generally includes the proposed resolutions to be voted upon at the meeting, explanations of the proposed resolutions, and other materials.

There are no special notice requirements imposed upon companies that have taken affirmative action to qualify their shares for trading outside of Taiwan, such as by establishing American Depositary Receipt (“ADR”) or Global Depositary Receipt (“GDR”) programs. Notice only would be provided to the shareholder listed in the shareholders’ roster (*i.e.*, the custodian).

## 3. Shareholder Proposals

The Act does not give shareholders the right to add a proposal to the agenda in advance of a shareholders meeting. A shareholder is permitted to make a proposal to the shareholders during the meeting, including for removal of a director during his term in office. However, proposals to re-elect the directors or supervisors, amend the corporate articles, or dissolve or merge the company cannot be proposed during a shareholders meeting. These items must have been included in the agenda of the meeting to be considered at the meeting; otherwise, the shareholders would have to make a request for a special shareholders meeting. Directors are elected from among the shareholders of a company. Corporate shareholders may appoint a representative to be elected as one of the directors of the company.

The board of directors of a company generally convenes shareholders meetings. However, shareholders holding at least 3% of the total shares issued by the company for at least one year are permitted to ask the board of directors to convene a special shareholders meeting. The Act does not limit explicitly this right to shareholders holding voting shares. The request must be in writing and must state the purpose for, and the agenda of, the special meeting. If the board of directors does not send out a notice convening the meeting within 15 days from the date the request was made, or is otherwise unable to convene a special shareholders meeting, the shareholders can apply to the government for authority to self-convene a shareholders meeting. The supervisor also may convene a special shareholders meeting when deemed necessary.

Holders of depositary receipts generally are not considered to be “shareholders” under Taiwanese law. These holders generally are not entitled to attend shareholders meetings or to vote the underlying shares, except through the custodian that is the registered owner of the shares. By extension, holders of depositary receipts probably also are not entitled to request a shareholders meeting. To vote or exercise other shareholder rights, the holders of depositary receipts would have to withdraw them from the ADR program (see Section VI below).

#### 4. Proof of Shareholder Status

Every Taiwanese company is required to maintain a shareholders’ roster. Only registered shareholders listed on the roster one month prior to the annual shareholders meeting and 15 days prior to a special shareholders meeting have a right to attend. Therefore, an investor purchasing registered shares of a Taiwanese company must take steps to ensure that its name is duly registered in the shareholders’ roster of the company. Shareholders holding bearer voting shares must submit the share certificates to the company five days prior to the meeting to be allowed to attend. Pledges made on registered shares will not affect the rights of the shareholder because physical possession of the shares is not required. On the other hand, if bearer shares are pledged, the holders must obtain the share certificates from the pledge and submit them to the company.

Taiwan does not recognize the concept of “beneficial ownership” of shares.<sup>3</sup> Beneficial owners of registered shares who are not listed in the shareholders’ roster, or who cannot obtain possession of bearer certificates, are not allowed to attend or vote at meetings, unless they act as a proxy of the nominee/broker/custodian.

If a custodian holds shares in its name on behalf of more than one beneficial owner, the custodian may vote shares only in the aggregate in favor of or against a proposal, in accordance with an interpretation of the Ministry of Economic Affairs. However, if a custodian is listed as a “co-owner” of shares with beneficial owners, the custodian may act as a proxy for the co-owner of the shares and may vote shares as proxy both in favor of and against a proposal.

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3 A “beneficial owner” is the owner of a security registered in another’s name (such as in the name of a broker).

## 5. Attendance at Shareholders Meetings

Only the record owner of registered voting shares is entitled to attend a shareholders meeting and vote the shares. The shareholders' roster records the names of the holders as they appear on the share certificate. Owners of bearer shares are required to submit the share certificates to the company prior to a shareholders meeting in order to attend and vote. The exact procedure to attend a shareholders meeting is governed by the corporate articles.

In practice, with respect to registered shares, a company will send a notice together with a form to the shareholders; shareholders must complete and properly seal the form and return it to the company in exchange for a pass. Thereafter, an individual shareholder need only bring his ID and the pass to attend the shareholders meeting. Corporate shareholders are permitted to appoint a representative to attend a shareholders meeting, but generally need to provide a letter of designation of the representative and a copy of his identification to the company prior to the shareholders meeting. These documents generally are not required to be translated into Chinese or notarized under Taiwanese law. However, the practice may differ from company to company. Shareholders holding bearer shares, as stated above, need to submit the share certificates to the company 5 days prior to a shareholders meeting.

There are no laws prohibiting shareholders from asking questions in a shareholders meeting or from bringing a translator. However, at a meeting of a public issuing company, a shareholder who desires to speak must complete a slip stating the purpose, shareholder's number (or pass number), and shareholder's name, and follow the instructions of the chairman of the meeting.

## 6. Proxy Voting

Voting by mail is not permitted; a shareholder or its proxy must attend a meeting in order to vote. Shareholders are permitted to delegate voting authority to another person/entity by issuing a proxy that specifically stipulates the authority granted. One shareholder only can issue one proxy and authorize one person/entity to act as a proxy. The proxy is permitted to exercise all of the rights of the shareholder, if so authorized.

Foreign investors may, but are not required to, be represented by a local attorney or any other representative in order to vote at a meeting. To vote by proxy through a delegate or representative, the foreign investor needs to fill out and affix its corporate seal to a proxy form designating the delegate and specifying the exact authority delegated and also should provide a copy of the delegate's identification. Unless otherwise specified by the corporate articles, none of these documents are required to be notarized.

A person/entity may act as a proxy on behalf of more than one shareholder. However, when the votes represented by a proxy, except for a trust company, exceed 3% of the total shares issued, the votes in excess of 3% will not be counted. A proxy is not prohibited from voting in favor of a proposal on behalf of one shareholder and against the same proposal on behalf of another shareholder.

## 7. Quorum

The Act mandates the following minimum quorum and voting requirements; Taiwanese companies are permitted to require higher quorum/voting procedures in their corporate articles.

- a. The following matters require a quorum of shareholders representing more than a majority of the total number of voting shares and must be resolved and adopted by a majority vote of the shareholders at the meeting:
  1. Director and supervisor compensation;
  2. Election of directors and supervisors (by cumulative voting method) and dismissal of directors and supervisors;
  3. Claims against directors;
  4. Approval of the annual financial reports;
  5. Setting aside of special reserves;
  6. Election of a liquidator, unless appointed by a court;
  7. Compensation of a liquidator, unless determined by a court; and
  8. Approval of the financial report made during a liquidation period.
- b. The following matters require a quorum of shareholders representing at least two-thirds of the total number of voting shares and must be resolved and adopted by a majority of the shareholders at the meeting; for a public issuing company, the quorum is shareholders representing a majority of the total number of voting shares, and a two-thirds vote of the shareholders attending the meeting is required to resolve and adopt the resolution:
  1. Any of the following resolutions submitted by the board of directors:
    - a. to enter into, amend, or terminate any contract for lease of the company's business in whole, or for entrusting the business, or for regular joint operation with others;
    - b. to transfer all or any essential part of the business or assets; or
    - c. to accept the transfer of another's whole business or assets, which would have a great impact on the business operation of the company;

2. Approval for a director to act in his self-interest, or on behalf of another person, within the scope of the company's business;
  3. Issuance of new shares by capitalization of retained earnings or legal reserve; and
  4. Amendments to the corporate articles.
- c. Other matters that must be resolved and adopted by a shareholders meeting include:
1. Any amendment to the corporate articles prejudicial to the privileges of the holders of special shares must be adopted by a meeting of holders of special shares. The quorum must be at least two-thirds of the total number of issued special shares, and the measure must be adopted by a majority vote.
  2. A resolution for dissolution, consolidation, or merger, of a company requires a quorum of shareholders representing at least three-fourths of the total number of issued shares and must be adopted by a majority vote. For a public issuing company, the resolution requires a quorum of shareholders representing at least a majority of the total number of voting shares and must be adopted by at least three-fourths of the votes of the shareholders present at the meeting.

The Act does not dictate special procedural requirements for determining whether a quorum has been obtained at a meeting. However, a public issuing company is required to maintain a signature book for shareholders attending a meeting, or to have shareholders submit a signature card. The shares present at a meeting are counted in the signature book or on the signature cards.

When the quorum is not met for a measure listed under paragraph (a) above, but attending shareholders represent at least one-third of the total number of issued shares, a tentative resolution can be passed by a majority of those present. A notice of the tentative resolution must be given to each shareholder, and within one month the company must convene a second shareholders meeting. If bearer shares have been issued, notice of the tentative resolution also must be published. In the second shareholders meeting, if the tentative resolution is adopted by a majority of those present who represent at least one-third of the total number of issued shares, it is deemed to be a passed resolution. The tentative resolution procedure is not available for measures listed in paragraphs (b) and (c) above.

## 8. Voting and Supermajority Provisions

As stated above, a shareholder may vote in person or by proxy. Generally, one share is entitled to one vote. However, the Act requires limitation of the voting rights of a shareholder holding 3% or more of the total shares issued. The exact percentage discount applied to votes over 3% is determined in the corporate articles. There is no minimum ownership percentage required in order for a shareholder to propose discussion of a matter at a shareholders meeting; the ability of a shareholder to call for a vote depends on the chairman of the meeting and any applicable rules for the meeting.



The minimum quorum and voting requirements for adoption of certain corporate measures are set out in Section I.C.7. above. The corporate articles can set higher requirements.

## 9. Voting Tabulation and Results of Shareholders Meetings

The Act does not specify a method for counting votes. Public issuing companies are required to have a chairman of shareholders meetings, who appoints personnel to supervise or count votes. The person who is appointed to supervise the voting must be a shareholder. The chairman must announce the results of votes in the meeting and record the result. The company is required to video or audio tape the entire meeting and to preserve the tape for at least one year.

A company is required to record the resolutions adopted at a shareholders meeting in the minutes of the proceedings, which are signed and sealed by the chairman. The minutes of proceedings must record the time, date, and place of the meeting, the name of the chairman, method of resolutions, the substance of the course of the proceedings, and the results thereof. The minutes must be distributed to all shareholders within fifteen days after the meeting. The Act also requires companies to keep the signatory book, minutes, and proxy forms at the company's offices so that shareholders can view them. Shareholders only need to provide proof of their status as a shareholder to access, review, and obtain excerpts from these documents.

The management of a company is not required to tabulate votes, and the law does not permit a shareholder to call for a tabulation. The Act also does not provide for verification of the results of votes.

## D. Rights of Minority Shareholders in Corporate Transactions<sup>4</sup>

Under the Act, when shareholders adopt a resolution to (a) enter into, amend, or terminate any contract for lease of the company's business, or for joint operation with others; (b) transfer the whole or any essential part of its business or assets (except in dissolution); or (c) accept the transfer of another's whole business or assets, which would have a great impact on the operation of the company, a shareholder can force the company to redeem its shares at the current fair market price. The shareholder must have notified the company in writing of dissent to the action prior to the shareholders meeting and also must have voted against the resolution at the shareholders meeting.

Where shareholders adopt a resolution to merge the company, the shareholders who dissented, either in writing or orally, and either before or during the shareholders meeting, can waive their right to vote in exchange for redemption of their shares by the company at the current fair market price. The request for redemption must be made in writing within 20 days after the date the resolution was passed and must specify the type and number of shares.

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4 Information provided is based on the ROC Company Law.

If the shareholder and the company agree on the price of the shares, the company must pay for the shares within 90 days from the date on which the resolution was adopted. If they do not reach an agreement within 60 days from the date on which the resolution was adopted, the shareholder has 30 days to apply to a court for a determination on the price. The company is required to pay interest on the price determined by the court. The payment must be made at the same time as the delivery of the share certificates, and the transfer of the shares is only effective at the time payment is made.

There are no circumstances under which an issuer can restrict the rights of shareholders, including minority shareholders.

## E. Transferability of Shares

Generally, shares can be freely transferred, except that the shares held by the promoters of a company (the original shareholders who formed the company) cannot be transferred during the first year after incorporation. The Act prohibits companies from restricting the transfer of shares in their corporate articles.

However, due to currency regulation, foreign investors are subject to certain restrictions on share transfers. Foreign investors are permitted to purchase shares of a listed company under the Regulations Governing the Securities Investment by Overseas Chinese and Foreign Investors (“Regulations”) as a portfolio investment, subject to an annual quota limitation with the approval of the Securities and Futures Commission. Foreign investors must apply for Foreign Investment Application (“FIA”) approval from the Investment Commission (“IC”) of the Ministry of Economic Affairs for any non-portfolio investment in a listed company (*i.e.*, where the investor will participate in the operation of the company). Although a foreign investor may transfer shares purchased as a portfolio investment freely, it must apply for the approval of the IC before it can transfer or otherwise dispose of any shares purchased through an FIA approval. FIA approval also is required to obtain shares of a non-listed company through private placement and again before transferring or otherwise disposing of these shares.

In addition, although generally there is (with a few exceptions) no restriction on the total shareholding of a foreign investor who invests with an FIA approval, a foreign investor who makes a portfolio investment in the stock of a listed company is subject to certain foreign shareholding restrictions. There is a ceiling on the amount of the total investment a foreign portfolio investor can make. Each foreign portfolio investor only can acquire a maximum of 50% of the total outstanding shares of a listed company. The aggregate shareholdings of all foreign portfolio investors, including mutual funds, in any one listed company cannot exceed 50% of the total number of shares issued and outstanding.

With few exceptions, the shares of a listed company only can be traded on the public stock markets, such as the Taiwan Stock Exchange and the Over-The-Counter market in Taiwan. Private placement of listed shares is not allowed.

## F. Accounting

Shareholders who own at least 3% of the total number of issued shares and have held those shares for at least one year may apply to a court for the appointment of an inspector to inspect the business, accounts, and property of a company.

The law does not limit the use of this mechanism to holders of voting shares. However, whether holders of depositary receipts are deemed “shareholders” is not clear under Taiwanese law, and therefore their right to call for the appointment of an inspector is questionable.

## G. Inspection Rights

Under the Act, financial statements and records of accounts (including the annual business report, balance sheet, inventory of principal properties, statement of profit and loss, status of changes in shareholders’ equity, cash flow statement, and proposal for allocation of surplus profit or loss) prepared by the board of directors and the report made by the supervisors must be maintained at the company’s offices for inspection by shareholders ten days prior to the regular meeting of shareholders. Shareholders may bring their lawyers or certified public accountants for the inspection.

Further, the board of directors is required to maintain at the company’s offices copies of the corporate articles, minutes of every shareholders meeting, balance sheet and statement of profit and loss, the shareholders’ roster, and records of checks. Shareholders can gain access to, and review and request excerpts of, these documents upon providing evidence of their status as a shareholder.

## II. Payment of Dividends

Generally, the allocation of surplus profit, dividends, and bonuses must be determined at the shareholders meeting. A company cannot declare dividends unless the company has profits after making up losses and setting aside the legally required reserve. Public issuing companies having a fixed amount or ratio for the distribution of dividends and bonuses and whose board is duly authorized in the corporate articles can distribute dividends in the form of stock by resolution of the board of directors.

Dividend distributions are not mandatory, and the Act does not prescribe a specific dividend distribution schedule and the amount to be paid. The distribution of bonus and dividends, unless otherwise provided in the corporate articles, is made in accordance with the percentage holding of each shareholder, except that the corporate articles must allocate a certain percentage of net surplus for an employee’s bonus. The shareholders may stipulate different dividend payments for holders of different classes of shares, if authorized in the corporate articles.

Companies are not required to announce publicly the payment of dividends. However, a public issuing company is required to report shareholders meetings to the Securities and Futures Commission with the notice of the meeting, proxies, meeting proceeding manual, and other supplemental information. As a result, public issuing companies indirectly will report the declaration of dividends.

The shareholders entitled to receive a dividend, bonus, or other benefit are determined on a record date declared by the board of directors. Only the shareholders listed on the shareholders’ roster on the record date are eligible to receive the distribution; new entries to the shareholders’ roster are prohibited starting five days before the record date.

Dividends are paid by check in New Taiwan Dollars. Foreign shareholders need to exchange the dividends into foreign currency if so desired. Cumulative dividends paid to holders of special shares are permitted if authorized in the corporate articles.

### III. Affiliated Transactions<sup>5</sup>

Under the Act, a shareholder that has a personal interest in a matter under discussion at a meeting that may impair the interest of the company cannot vote or act as a proxy for another shareholder. Transactions of a company with its related individuals and entities are required to be disclosed in the financial statements of the company, which are distributed to the shareholders of the company in preparation for the annual shareholders meeting. The financial statements also have to be reported to the Securities and Futures Commission and published to the public.

There are no restrictions on the ability of an officer, director, or employee of a company to own more than a certain percentage of stock purchased over the stock markets or from third parties. A company also may issue new shares to its directors, officers, or employees, subject to the pre-emptive rights of the existing shareholders and employees. All the shares issued by a company at the same time must be subscribed at the same subscription price, which is determined by the board of directors. Only when an existing shareholder or employee waives the right to subscribe, may the company contact a specific person, including its directors, officers, or certain employees, to subscribe the new shares at the same subscription price.

Any issuance of new shares by a listed company must be reported to the Securities and Futures Commission. Although there is no market price for newly issued shares, the subscription price must be carefully calculated and reported to the Securities and Futures Commission. Any change to the share issuance plan must be reported to the Securities and Futures Commission and at the next shareholders meeting.

## IV. The Role of Local Regulators and Stock Exchanges in Enforcing Shareholder Rights

### A. Responsibility of the Board of Directors

The board of directors and each director have a fiduciary duty to the company because the directors are engaged under a mandate by the company. Directors only have been held personally liable for a breach of their duty to the company, not to shareholders. It is generally believed that shareholders of a company do not have a cause of action against a director for the director's breach of his duty to shareholders. Under certain circumstances, shareholders may sue the directors for their wrongful conduct vis-a-vis the company. This cause of action is derivative to the plaintiff's status as a shareholder of that company (see Section IV.C. below). There have been successful cases in which directors have been held personally liable for the breach of their duty to the company in a derivative suit.

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<sup>5</sup> Information provided is based on the ROC Company Law.

## B. Enforcement of Rights by Local Regulators

There is no law that requires regulators to protect the rights of shareholders. The Securities and Futures Commission regulates public issuing companies (including both listed and non-listed companies) and has issued rules regarding: the content of financial statements and annual reports; the disclosure of financial and business information and loans; internal control systems; acquisition and disposal of assets; endorsements and guarantees provided by listed companies, etc. By implementing rules and regulations concerning most aspects of a company, the Securities and Futures Commission tries to protect indirectly shareholders' rights.

The local stock exchanges also play a role in assisting the Securities and Futures Commission in enforcing these rules and regulations. Failure of a company to comply with the rules and regulations of the Securities and Futures Commission will subject the company to fines and the responsible individuals to imprisonment; in certain circumstances, the company might even be banned from raising new funds from the public.

## C. Enforcement of Rights through the Judicial System

In the event the procedure for convening a shareholders meeting or the method of passing a resolution is in violation of any law or the corporate articles, any shareholder can, within one month from the date on which the resolution was adopted, institute a suit for annulment of the resolution.

In the event the board of directors resolves to do an act outside of the scope of the registered business of the company, or in violation of the law or the corporate articles, any shareholder who has continuously held shares for at least one year can request the board of directors to stop the act. If the board ignores this request, the directors who resolved to do the act can be subject to a fine up to \$60,000 NT and may be required to compensate the company for any losses. The shareholders can, at the next shareholders meeting, vote to remove the directors or can ask the supervisor to stop the actions of the board.

If a director takes any action causing substantial loss or damage to the company, or in violation of the law or the corporate articles, and the shareholders meeting fails to adopt a resolution to remove him from office, shareholders holding at least 3% of the total number of issued shares for at least one year may apply, within 30 days after the shareholders meeting, to the courts for a decision to remove the director.

In addition, shareholders that have held at least 5% of the total number of issued shares for at least one year may request, in writing, that the supervisor institute an action against any director on behalf of the company.

## V. Financial Information and Auditors<sup>6</sup>

The Act requires at the end of the fiscal year that the board of directors prepare a business report, balance sheet, inventory of principal properties, statement of profit and loss, status of changes in shareholders' equity, and cash flow statement and submit them to the supervisors for examination 30 days prior to the annual shareholders meeting.

The Act also requires that financial statements and records of accounts (including the annual business report, balance sheet, inventory of principal properties, statement of profit and loss, status of changes in shareholders' equity, cash flow statement, and proposal for allocation of surplus profit or loss) prepared by the board of directors and the report made by the supervisors be maintained at the company's offices for inspection by the shareholders, ten days prior to the annual meeting of shareholders. Shareholders with evidence of their status as a shareholder can enter the company's offices to review or make excerpts from these documents.

The Securities and Futures Commission requires reporting and/or publication of certain financial information, including: monthly operation income; the amount of any guaranty, endorsement, or loan provided by the company; financial statements for the first and third quarters of each fiscal year within one month from the end of the first and third quarters respectively; and a financial statement on the first half of each fiscal year within two months after the close of the first half of the fiscal year. A listed company also must report and publish annual financial statements approved by the board of directors and the supervisor within four months from the end of each fiscal year. Reports only are required to be published in Chinese and must appear in a local newspaper.

Auditors must be certified public accountants, and their audit reports must be made in accordance with the generally accepted accounting principles published by the Accounting Association of Taiwan. They cannot be influenced by the management of the company. The appointment and dismissal of outside auditors and their compensation requires the consent of a majority of the directors. Only an accounting firm formed by two or more certified public accountants can serve as the accountant of a listed company. Applicable accounting principles require auditors to make certain footnote disclosure statements if they find problems within a company.

## VI. Depositary Receipts/Nominee Rights

Under Taiwanese law, it is not clearly stated whether the holders of depositary receipts (such as ADRs or GDRs) are considered to be holders of the securities underlying the depositary receipt program. Generally, however, it is believed that the holders of ADRs and GDRs are not entitled to attend shareholders meetings or to vote at meetings, unless these holders are acting as the proxy of the custodian.

It is necessary for ADR holders to seek redress for violations of their rights through the entity that put the program together, such as the custodian. Subject to the terms of the depositary agreement, ADR holders generally can give voting instructions and cause the custodian to vote the underlying securities in a certain way. In the event that holders of more than 51% of the total units issued give the same voting

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6 Information provided is based on the ROC Company Law and Securities and Futures Commission requirements.

instruction, the custodian generally is bound by contract to vote according to those instructions. If voting instructions are not obtained from at least 51% of the total units of the ADR holders, the custodian is not bound by contract to vote. In practice, however, the custodian usually will exercise the voting rights.

The holder also may withdraw the ADR or GDR and receive the underlying shares in the Taiwanese company, subject to the deposit agreement and the Taiwan foreign investment regulations. The holder then becomes a shareholder who is entitled to vote the shares and to attend shareholders meetings, so long as the other requirements for voting (such as registration in the shareholders' roster) are met.

## **VII. Corporate Governance Code**

The ROC government has not adopted a Code of Conduct or Corporate Governance Code at this time.





# Europe



# Survey of Corporate Governance Practices in Selected European Countries

## I. Rights of Shareholders

	France	Germany	Italy
A. Share Ownership:			
<i>Can companies issue classes of stock with different rights?</i>	Yes.	Yes.	Yes.
B. Voting Rights of Shareholders:			
<i>a. Can shares have unequal voting rights?</i>	Shares of the same class may have unequal voting rights, although generally voting rights are based on the one share, one vote rule. Preferred shares may be issued with double voting rights or with no voting rights. Also, a company's corporate articles may limit the number of votes that may be exercised by a shareholder, provided that the limitation extends to all classes of shares.	Shares of the same class must have the same voting rights; only preferred stock is permitted to be non-voting. Voting rights are based on the general one share, one vote rule.	Shares of the same class must have the same voting rights; preferred stock and other shares of stock are permitted to be non-voting. Voting rights are based on the general one share, one vote rule.

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>b. May voting rights be altered, and under what scenarios?</i>	<p>Voting rights initially may be limited by the company's corporate articles or may be altered upon shareholder vote at an extraordinary shareholders meeting.</p> <p>Voting rights may be completely withdrawn in certain circumstances. See France Tab, Section I.B.</p>	<p>Non-listed companies can limit voting rights and alter the one share, one vote rule. Voting rights cannot otherwise be altered, even by shareholder approval.</p>	<p>Voting rights may be altered by a special resolution of the shareholders affected.</p>

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>c. Are there circumstances under which non-voting shares may be voted? What are the requirements for calling a meeting of non-voting shares?</i>	<p>Preferred non-voting shares may acquire voting rights if preferential dividends due for the past three fiscal years have not been paid or if certain rights of the shares are affected. The quorum requirement for a meeting of preferred non-voting shares is shareholders holding 50% of the preferred non-voting shares for a meeting held on first call and 25% of preferred non-voting shares for a meeting held on second call. The meeting may be called by the board, the statutory auditors, or an agent appointed by a court at the request of shareholders holding 1/10 of the preferred non-voting shares.</p>	<p>Non-voting preference shares have voting rights if: (1) the preference dividend is not fully paid; (2) the preferential rights of the shares are cancelled; or (3) new shares will be issued that have priority over the shares. In the event of non-payment of the dividend, the voting right ends when the shortfall is paid. There are no quorum requirements for such meetings. Only the managing directors of a company can call a meeting of non-voting shares.</p>	<p>Non-voting shares, such as preferred shares and savings shares, have voting rights if certain rights of the shares are affected. If a special meeting is called to approve a change in rights of savings shares or settle a dispute with the company, the quorum requirement is 20% of outstanding savings shares for a meeting held on first, second, or third call. If a special meeting is called to appoint or dismiss the shareholder representative or to create a fund to cover expenses incurred in protecting the rights of savings shareholders, the quorum requirement is 20% of outstanding savings shares for a meeting held on first call, 10% for a meeting held on second call, and no requirement for a meeting held on third call. A meeting of savings shares only can be called by the representative of the savings shareholders or shareholders holding 1% of the company's outstanding shares.</p>

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>d. Is cumulative voting permissible?</i>	No.	No.	Yes.
<i>e. Are the rights of foreign shareholders subject to restrictions that do not apply to domestic investors?</i>	No. Except that preferred double voting shares only may be held by French and European Union member shareholders.	No.	No.
C.1. Shareholders Meetings – Record Dates:			
<i>a. Are record dates used to determine rights to vote at a shareholders meeting?</i>	<p>No. Nominative shareholders may vote if they produce certification from the company that the shares have been registered in their name.</p> <p>For bearer shares, a certificate from an intermediary (such as a bank) must be produced confirming the non-transferability of the shares until after the meeting.</p>	No. Shareholders generally are required to provide evidence of their status as a shareholder on the date of the meeting.	Yes. For non-listed companies, shareholders must be registered at the broker of the company or must deposit shares with a bank five days before a meeting. For listed companies, shareholders must obtain a certificate of ownership from the bank, broker, or financial institution at least five days before the meeting.

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>b. May shares of a company be freely traded after the record date and prior to a shareholders meeting? If not, what restrictions would apply?</i>	No. Shares are “blocked” once a certificate is issued by the company and cannot be transferred prior to the shareholders meeting. The blocking period may not exceed five days.	N.A. But bearer shares must be placed in escrow prior to any shareholders meeting.	No. For non-listed companies, shares that have been deposited with the company or a bank (at least five days before the meeting) cannot be returned or traded prior to the shareholders meeting.  For listed companies, once a certificate of ownership is issued (at least five days before the meeting), shares cannot be traded prior to the meeting.
<i>c. If the meeting is adjourned, is trading restricted until the next meeting?</i>	Yes. If a quorum is not obtained, a new meeting must be convened, which will require the shares to be blocked again. If the meetings are held in close succession (less than five days), the blocking may be maintained between the two meetings.	No.	No.

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
C.2. Shareholders Meetings – Notice Requirements:			
<i>a. What notice of shareholders meetings is required to be given?</i>	For a listed company, notice must be published in a legal announcement journal (and often is published in a newspaper also). For an unlisted company, notice only is given by recorded delivery letter to those shareholders that have asked to receive notice.	Notice of shareholders meetings must be published in the official government gazette.	Notice of shareholders meetings must be published in the official government gazette. For non-listed companies, notice also may be given to each shareholder. For listed companies, notice also is published in a newspaper with national distribution.
<i>b. Are there any general or special requirements for giving notice?</i>	At least 30 days' notice by publication must be given to shareholders of listed companies, and at least 35 days' notice by mail to shareholders of unlisted companies that have asked to receive notice.	Notice must be given at least 30 days before the meeting, and additional notice is required directly to certain shareholders within 12 days after the original notice.	For non-listed companies, notice must be given at least 15 days before the meeting. For listed companies, notice must be given at least 30 days before the meeting. If a meeting is adjourned, a new notice must be published within 30 days after the original meeting date and at least eight days, but no more than 15 days, before the new date for the adjourned meeting.
<i>c. Must the entire agenda and date and location of the meeting be identified?</i>	Yes.	Yes.	Yes.

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>d. Can an item be added onto the agenda for a shareholders meeting without notice being given to shareholders?</i>	No. However, shareholders may vote on “other business” not included on the agenda provided it is of minimal importance, and shareholders may revoke the appointment of directors and members of the supervisory board and proceed with their replacement.	No. Not by management, but shareholders can add a proposal to the agenda under certain circumstances.	No. Unless all shareholders, directors, and statutory auditors are present at the meeting and the agenda item only pertains to the financial statements.
C.3. Shareholder Meetings – Shareholder Proposals:			
<i>a. Can a shareholder submit a proposal for the agenda of a shareholders meeting? What are the procedural or substantive limitations?</i>	Yes. Shareholders owning a specified percentage of the voting shares of the company are entitled to request the inclusion of proposed resolutions on the agenda. See France Tab, Section I.C.3 for details. There are no substantive limits on what proposals a shareholder may submit.	Yes. Shareholders holding at least 5% of the share capital, or shares with a nominal value of at least 500,000 Euros, for at least three months can ask the management board to add an item to the agenda. The request must be made in writing and state the purpose or grounds for the proposal. The additional item must be published within ten days after the notice of the meeting. The board is not required to add the agenda item; if it refuses, the shareholders can file a lawsuit to enforce the request in court.	Italian law does not specifically permit a shareholder to add a proposal to the agenda for a shareholders meeting. However, a shareholder may make a proposal through a member of the board of directors.



	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>b. Can a shareholder call a special meeting of shareholders?</i>	<p>Yes. Majority shareholders of a company can call a special meeting of shareholders in connection with a proposed public sale or exchange of shares, but only if the board of directors has failed to call a meeting.</p> <p>Shareholders owning 10% of the voting stock may ask a court to appoint an agent to call a shareholders meeting. See France Tab, Section I.C.3.</p>	<p>Yes. Shareholders holding at least 5% of the share capital, or a nominal value of at least 500,000 Euros, for at least three months can request a special shareholders meeting. The request must be made in writing to the management board and state the purpose/grounds for the meeting. The board is not required to grant the request; if it refuses, the shareholders can file a lawsuit to enforce the request in court.</p>	<p>Yes. Shareholders holding at least 20% of the share capital can ask the directors to call a shareholders meeting. If the directors refuse, a meeting will be ordered by a decree of the president of the court.</p> <p>In addition, shareholders holding 10% of the share capital of a listed company (or a lower percentage if specified in the corporate articles) may request the directors to call a shareholders meeting. The directors may reject the request if they do not deem it to be in the interest of the company.</p>
<i>c. Can a shareholder propose to nominate a candidate to the board of directors or remove a director?</i>	<p>Yes. Shareholders owning a specified percentage of the voting shares of the company may propose that the nomination of a director to, or removal of a director from, the board be added to a shareholders meeting agenda.</p>	<p>Yes. Any shareholder can nominate a candidate to the supervisory board or propose the removal of a member of the supervisory board. Shareholders only can indirectly influence the composition of the management board (which is appointed by the supervisory board).</p>	<p>Yes. Any shareholder can nominate a candidate to the board of directors at a general shareholders meeting or propose the removal of a director. The company bylaws may impose requirements on this process.</p>

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
C.4. Shareholders Meetings — Proof of Shareholder Status:			
<i>a. What are the requirements to be a legally recognized shareholder for the purpose of voting at a shareholders meeting?</i>	<p>A shareholder must be able to prove status as a shareholder.</p> <p>Nominative shareholders are listed on the share register of a company.</p> <p>Bearer shares (whose shareholdings are listed on a register kept by an intermediary) must obtain a certificate from the intermediary attesting to the ownership and that the shares will be non-transferable until the meeting date.</p>	<p>Corporate articles govern this issue, and generally require some evidence of ownership. German corporations generally issue bearer shares, and the articles generally require that these shares be placed in escrow prior to the meeting. Where a company issues registered shares, the articles generally require shareholders to file a notice of attendance prior to the shareholders meeting. Where shares are held by a bank acting as custodian or nominee, shareholders can obtain certificates of deposit as proof of ownership.</p>	<p>A shareholder must deposit his shares five days before the meeting with the company, a bank specified by the company, or an intermediary (such as a bank or broker).</p> <p>For non-listed companies, the custodian bank must issue an admission ticket to the meeting. For listed companies, the intermediary must issue a certificate of ownership.</p>

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>b. Often shares are held in the name of a nominee, such as a broker or custodian, although owned by another person (the beneficial owner). Can shares be held in the name of a nominee, yet still be voted by the beneficial owner?</i>	No. Only the person registered as the shareholder is entitled to vote. In practice, the beneficial shareholder may instruct the person (such as a securities broker or custodian bank) in whose name the shares are registered to vote, although the shareholder's instructions may be disregarded. It may be necessary for a beneficial shareholder to give a mandate to vote to the custodian or negotiate this requirement with the custodian.	Yes. If the beneficial owner obtains some indication of ownership (such as a certificate of deposit from a custodian bank). In practice, shareholders usually receive all documents necessary for attendance and voting at shareholders meetings through their banks.	Yes. If the shares are held by an intermediary (such as a bank, broker, or other financial institution), the shares can be voted by the beneficial owner.
<i>c. If shares are held in the name of a custodian or other nominee, could the custodian vote some shares in favor of a proposal for one beneficial owner and other shares against the same proposal for another beneficial owner?</i>	Yes. Although there is some debate on this topic. See France Tab, Section I.C.4.	Yes. To vote shares on behalf of the beneficial owners, a broker, custodian, or other nominee must produce a written proxy.	Yes. To vote shares on behalf of the beneficial owners, a broker, custodian, or other nominee must produce a written proxy.

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
C.5. Shareholders Meetings — Attendance at Shareholders Meetings			
<i>a. Can a shareholder (of record or beneficial) attend annual or special meetings? What restrictions apply?</i>	<p>Generally, only shareholders of record may attend meetings, with some limitations. See France Tab, Section I.C.5. Shareholders may be represented at shareholders meetings and have their voting rights exercised by their representatives under the following strict conditions: (i) a shareholder may be represented by another shareholder; and (ii) a legal entity may be represented by a person legally entitled to represent it.</p>	<p>Yes. Every owner of shares, including non-voting, is entitled to attend every shareholders meeting. There are no restrictions other than proof of ownership pursuant to the corporate articles.</p>	<p>Only shareholders of record with the right to vote may attend a shareholders meeting and vote. If shares are held by an intermediary (a bank, broker, or other financial institution), shares remain in the name of the shareholder and the shareholder can attend and vote at a meeting. Preferred non-voting shareholders may be permitted to attend a meeting even without voting rights for the meeting.</p>

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>b. What documents are required to attend the meeting?</i>	<p>Shareholders must present a certificate from the company (usually in the form of an admission card) proving their status as shareholders.</p> <p>Representatives of legal entities must bring a copy of the court or corporate document naming them as representatives. Proxy holders should provide evidence of the delegation of proxy. See Block C.6.d.</p>	<p>These requirements are set by a company's articles and can vary. Where proof of ownership is required, a certificate of deposit may be required.</p> <p>Representatives of legal entities should bring proof of authorization to act as a representative. Documentation should (but is not legally required to) be translated into German.</p>	<p>A shareholder must bring a certificate of shareholder status (obtained from a bank, broker, or other financial institution for shares of a listed company) or admission ticket (obtained from the custodian bank for a non-listed company). Any proxy of a shareholder attending the meeting must bring a written proxy.</p> <p>Representatives of legal entities should bring to the meeting evidence that (1) the legal entity is an investor in the Italian company; and (2) the representative has authority to represent the legal entity (such as corporate articles, bylaws, or president's certificates). This documentation should be translated into Italian.</p>

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>c. May a shareholder ask questions at the meeting? May a shareholder bring a translator to the meeting?</i>	<p>Shareholders may submit written questions up to the date of the meeting. They also may ask for additional explanations to their questions at the meeting.</p> <p>A shareholder should ask for prior permission before bringing a translator to a meeting.</p>	Yes. Shareholders may ask questions at meetings and bring a translator.	Yes. Shareholders may ask questions and bring a translator.
C.6. Shareholders Meetings – Proxy Voting:			
<i>a. Can shareholders vote by form of proxy at a shareholders meeting? What are the restrictions or requirements?</i>	Shareholders may vote by mail using a special form prepared by the company. The form must be requested from the company no later than six days before the meeting.	Voting by mail is not permitted; the shareholder or its proxy must attend the meeting. A shareholder can appoint company management as proxy, but management cannot have any discretion in casting the vote.	Voting by mail is permitted for listed companies if certain procedures are met. For unlisted companies, the shareholder or its proxy must attend the meeting. A company's corporate articles may prohibit use of proxies at a shareholders meeting and require attendance in person.

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>b. May shareholders delegate authority to another person to act as proxy?</i>	Yes. A shareholder may delegate voting authority to another shareholder. (Note that the “shareholder” is the shareholder of record; French law does not recognize the beneficial shareholders). A shareholder also may send a blank proxy to the company, which the chairman will vote for all proposals approved by the board and against all other proposals.	Yes. Shareholders may delegate voting authority to a representative.	Yes. Shareholders may delegate voting authority to a representative except to a director, a statutory auditor, or personnel or an affiliate of the company.
<i>c. May delegates of a shareholder vote in person or by proxy?</i>	The shareholder’s proxy must attend the meeting and vote in person.	The shareholder’s proxy must attend the meeting and vote in person.	The shareholder’s proxy must attend the meeting and vote in person. The second proxy only can vote by proxy if the second proxy is expressly identified in the original proxy document.
<i>d. What are the general requirements for delegating voting authority to a person to act as proxy?</i>	The designation of proxy must be written and signed by the shareholder and must contain the identification and address of the shareholder. The proxy must have a tax stamp of FRF 5.	All proxies must be given in writing and translated into German.	All proxies must be signed and dated and indicate the name of the proxyholder. The proxy may be exercised only for the proposals indicated on the proxy form.

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>e. What general limitations exist for a person who is acting as a proxy? Can a proxy vote in favor of a proposal for one shareholder and against the same proposal for another shareholder?</i>	No general limitations exist. A company's corporate articles may limit the number of votes a person may have by proxy. A proxy may vote on behalf of more than one shareholder and may vote in favor of a proposal for one shareholder and against the same proposal for another shareholder.	No general limitations exist. A proxy (including a bank, custodian, or other nominee serving as proxy) may vote on behalf of more than one shareholder in accordance with the instructions. If so instructed, a proxy may vote in favor of a proposal for one shareholder, and against the same proposal for another shareholder. Proxies in favor of a bank cannot exceed 15 months.	For non-listed companies, a proxy cannot represent more than ten shareholders and, for a listed companies, a proxy cannot represent more than a specified number of shareholders depending on the size of the company. A proxy (including a bank, custodian, or other nominee serving as proxy) may vote on behalf of more than one shareholder and may vote in favor of a proposal for one shareholder and against the same proposal for another shareholder.



	<b>France</b>	<b>Germany</b>	<b>Italy</b>
C.7. Shareholders Meetings – Quorum:			
<i>What are the requirements for determining if a quorum has been obtained?</i>	<p>For ordinary meetings, the quorum requirement is 25% of the shares entitled to vote. For extraordinary meetings, it is 33 1/3% of the shares entitled to vote. For special meetings, it is 50% of the shares entitled to vote.</p> <p>The quorum requirement for meetings that are reconvened for failure to obtain a quorum are as follows: For ordinary meetings, no quorum is required. For extraordinary meetings, the quorum is 25% of the shares entitled to vote. For special meetings, the quorum is 25% of the shares entitled to vote.</p> <p>(For information on types of meetings, see France Tab, Section I.C.7.)</p>	<p>There is no requirement for a quorum to conduct business at a shareholders meeting. The corporate articles can require a quorum, but this is not the usual practice.</p>	<p>For general meetings, the quorum requirement is 1/2 of the share capital outstanding. For special meetings, it is 1/2 of the share capital outstanding, unless the corporate articles require a higher measure.</p> <p>The quorum requirement for meetings that are reconvened for failure to obtain a quorum are as follows: For general meetings, the quorum requirement may be reduced or eliminated. For special meetings, the quorum requirements are reduced. See Italy Tab, Section I.C.7.</p>

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
C.8. Shareholders Meetings – Voting and Supermajority Provisions:			
<i>a. How does a shareholder vote shares?</i>	A shareholder can (i) attend the meeting in person, (ii) give a blank proxy to the company (which will be voted in favor of all items approved by the board), (iii) delegate voting authority to another shareholder, or (iv) vote by mail. For limitations on voting, see France Tab, Section I.C.8.	Shareholders can attend the meeting in person or designate a proxy, who must attend the meeting in person.	A shareholder can vote shares in person or by proxy. For listed companies, voting by mail also is permitted. Also, if a shareholder holds more than 2% of a listed company, the shareholder must notify authorities before it can vote.
<i>b. What are the general requirements for voting for a measure to be adopted?</i>	Most measures can be adopted by a simple majority of voting shares at an ordinary meeting. For an extraordinary meeting, resolutions are adopted by 2/3 of voting shares.	Generally, measures can be adopted by a simple majority of shares present and voting at a shareholders meeting, but the articles can specify a higher percentage for most measures. See Germany Tab, Section I.C.8.	Most measures can be adopted by a simple majority of shares voting at a general shareholders meeting, unless the corporate articles require a higher voting measure. For special shareholders meetings, a higher voting measure may be required. See Italy Tab, Section I.C.8.

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>c. Can a company adopt higher (supermajority) voting measures?</i>	No. However, shareholders can unanimously decide that certain resolutions must be decided by a supermajority vote.	Yes. Except for certain measures that must be subject to a simple majority voting requirement. See Germany Tab, Section I.C.8.	Yes. Supermajority requirements may be adopted for both quorum and voting purposes.
<i>d. Are supermajority voting requirements required by law?</i>	Yes. French law requires a higher vote (unanimity of votes) for a few issues (such as change in domicile). See France Tab, Section I.C.8.	Yes. For some measures, a 75% majority of the votes <u>cast</u> at a shareholders meeting is required. For other measures, a 75% majority of the share capital <u>represented</u> at a shareholders meeting is required. See Germany Tab, Section I.C.8.	For listed companies, resolutions must be adopted at a special shareholders meeting by a vote of 2/3 of the shareholders present in person or by proxy (unless a company's corporate articles require a higher voting measure).

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
C.9. Shareholders Meetings – Voting Tabulations and Results of Shareholders Meetings:			
<i>a. What general mechanisms apply in counting votes?</i>	The method of voting is determined by a group (“bureau”) (consisting of the president and secretary of the meeting and two observers, who are usually the two shareholders possessing the largest number of votes) and is ratified by the other shareholders. Secret voting is permitted if expressly provided for in the corporate articles.	The method for voting is determined by the corporate articles. A show of hands could be sufficient.	For listed companies, there is normally a formal counting of votes that is verified by individuals appointed by shareholders.  There is no required voting mechanism. For smaller companies, shareholders vote by a show of hands. For listed companies, votes normally are counted and formally verified by persons appointed by the shareholders.
<i>b. Is management of a company required to tabulate the votes?</i>	No.	No.	Yes.
<i>c. May foreign investors call for a tabulation? What limitations apply?</i>	No. If shareholders have ratified the method of voting selected by the bureau, a shareholder cannot call for a tabulation or formal counting of votes.	No. Vote counts and results are recorded as part of the minutes.	No. Shareholders, foreign and domestic, cannot force a tabulation of votes; however, shareholders may force a vote to be called if an item has not been voted upon.

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>d. What are the requirements regarding the verification of votes of a shareholders meeting?</i>	There are no requirements for verification of votes. If shareholders have a legitimate concern that there will be problems during a meeting, they may ask the Commercial Court to appoint a bailiff to prepare a transcript of the debate.	There are no requirements for verification of votes.	There are no requirements for verification of votes, unless the corporate articles provide requirements.
<i>e. What information is made available to shareholders regarding the results of a shareholders meeting?</i>	Official minutes must be prepared after each meeting. Shareholders have the right to access minutes for the last three fiscal years.	For listed companies, minutes of meetings, with vote results, must be recorded and signed by a German notary. Non-listed companies' minutes may be signed by the chairman of the supervisory board. The minutes must be filed in the public register of commercial documents.	Minutes must be recorded in the minutes register. Minutes of special meetings must be drafted by a notary public who acts as secretary for the meeting. Shareholders may obtain access to the minutes register.

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
D. Rights of Minority Shareholders in Corporate Transactions:			
<i>a. What rights does a minority shareholder have in a corporate transaction (such as a merger, takeover, privatization, etc.)?</i>	<p>For various transactions (including when the controlling shareholders decide to merge, sell most of the assets, or substantially reorganize a listed company) dissenters' rights or appraisal rights exist.</p> <p>During a takeover bid, certain regulations protect minority shareholders.</p> <p>Minority shareholders that have held shares for two years may form an "association" to represent their interests. See France Tab, Section I.D.</p> <p>Depending on the number of shares held by the shareholder, there are various options, including bringing a derivative action against the directors of the company. See France Tab, Section I.D.</p>	<p>Most major corporate transactions require approval of 75% of the share capital represented at a shareholders meeting. Where the transaction affects the value of shares, the shareholders of the company to be acquired have the right to fair and reasonable compensation from the purchaser. If shareholders object to the transaction on these grounds, they can file a lawsuit in court to enforce their rights.</p>	<p>For certain major corporate transactions, such as merger, a dissenting shareholder has the right to be cashed out at a price based on the share price during the past six months. The request must be made by registered mail. If the shareholder attended the shareholders meeting at which the transaction was approved, the request must be made within three days of the meeting; if the shareholder did not attend the meeting, the request must be made within 15 days of the registration of the meeting minutes in the company register.</p>

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<p><i>b. Can shares be subject to mandatory redemption or sale? How is the share price determined?</i></p>	<p>Yes. A company's corporate articles may provide for mandatory redemption or sale of shares. See France Tab, Section I.D.</p> <p>For listed companies, a majority shareholder or group holding 95% of the voting rights may "squeeze out" a minority shareholder by purchasing all shares of the minority shareholders, regardless of consent. The share price is determined by the majority shareholder and based on a valuation confirmed by an independent expert. See France Tab, Section I.D.</p>	<p>No.</p>	<p>Yes. If one shareholder owns more than 98% of a company after a tender offer, the 98% shareholder has the right to acquire any remaining shares. The purchase price of the shares would be set by a court-appointed expert and would take into account the tender offer price and recent market price.</p>
<p><i>c. How can a minority shareholder object to actions taken by majority shareholders in a corporate transaction?</i></p>	<p>The only means to contest an action of a majority shareholder or management is to initiate court action. See France Tab, Section I.D.</p>	<p>Dissenting votes and any oral comments are recorded in the minutes and filed in the public register of corporate documents. See Germany Tab, Section I.D.</p>	<p>Shareholders may bring an action claiming an act was unlawful. See Italy Tab, Section I.D.</p>

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>d. Under what circumstances can an issuer restrict the rights of shareholders?</i>	The main circumstance under which an issuer can restrict the rights of minority shareholders is during a “squeeze out” of minority shares by a majority shareholder. See France Tab, Section I.D.	None, except where a class is issued with restricted rights.	None, except where a class is issued with restricted rights.
E. Transferability of Shares:			
<i>Are there any limitations on the ability of a minority or foreign shareholder to sell or transfer shares?</i>	Generally, no limitations are imposed. For exceptions, see France Tab, Section I.E.	No. There are no such specific limitations.	No. There are no such specific limitations, although for non-listed companies, the corporate articles may provide for a right of first refusal in favor of other shareholders.



	<b>France</b>	<b>Germany</b>	<b>Italy</b>
F. Accounting:			
<i>Under what circumstances can a shareholder seek an accounting of the issuer?</i>	One or more shareholders representing 10% of shares may request in court an expert to draft a report on one or several management operations See France Tab, Section I.F.	At a shareholders meeting, a special auditing can be requested by a simple majority vote, which can be enforced by a court order. Each shareholder also is entitled to a copy of the annual statement of accounts. In addition, shareholders holding 5% of the share capital of a company can request an audit with respect to the company's financial statements.	Shareholders may not seek an accounting from a company. However, the statutory auditors and independent auditors may request an accounting.
G. Inspection Rights:			
<i>Do shareholders have inspection rights (such as to review a company's share register, minutes of meetings, financial statements, and other documents)?</i>	Yes.	Shareholders are entitled to any information necessary to vote, free of charge. Most documents are in the public register of corporate documents. However, shareholders cannot review minutes of supervisory or management board meetings.	Yes. Shareholders can examine a company's share register and the shareholders meeting minutes register. For listed companies, shareholders also have the right to examine all documents filed at the company's registered office.

## II. Payments of Dividends

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>a. Do companies publicly announce the payment of a dividend?</i>	Yes. Listed companies must publish the information in a legal announcement journal. All companies also must file reports, which include information on dividends, annually with the Commercial Court.	Yes. Listed companies must announce the payment of a dividend; generally, this is done in a German newspaper.	Yes. Listed companies must announce the payment of a dividend in a newspaper and send notice to the Italian Stock Exchange. Non-listed companies also must announce the payment of a dividend.
<i>b. Are dividend distributions mandatory or discretionary?</i>	Dividend distributions are discretionary, but a company's corporate articles may provide for payment of certain "guaranteed dividends."	Dividend distributions are discretionary. Dividends are declared by shareholder resolution, based on a proposal from the management board.	Dividend distributions are discretionary. Dividends are declared by resolution of the board of directors and approved at a general shareholders meeting.
<i>c. Are different dividend payments permitted for foreign and domestic shareholders or majority and minority shareholders?</i>	No.	No.	No.
<i>d. Are cumulative dividends permitted (where preferred stock gets past-due dividends before common-stock dividends get paid)</i>	Yes. If permitted by a company's corporate articles, in connection with payment of a "guaranteed dividend" or dividends on preferred shares.	Yes.	Yes. Italian law does not have provisions regarding cumulative dividends, but a company's corporate articles may provide for the payment of cumulative dividends.
<i>e. Are dividends payable only in local currency?</i>	No.	Yes. Although payment in euros is becoming more common.	No. Dividends are payable in lire or euros.

### III. Affiliated Transactions

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>a. Are there restrictions on transactions by a company with its affiliates, including employees?</i>	Certain transactions by a company with directors and others are prohibited (such as borrowing money from a company). Certain other transactions are regulated and must be approved by the board of directors (such as transactions where a director has an interest in an agreement with the company). See France Tab, Section III.	Transactions with affiliates are subject to several restrictions and limitations. See Germany Tab, Section III.	Directors may not enter into loan agreements with the company and may not obtain guarantees for personal debts from the company. Directors also may not sell assets to the company under certain circumstances without shareholder approval. See Italy Tab, Section III.
<i>b. Are there restrictions on an officer or director owning more than a certain percentage of stock?</i>	No. Subject to specific exceptions. There are defined restrictions for employees for purposes of stock option plans and subscription or acquisition opportunities.	No. However, there are insider trading rules.	No.
<i>c. Can a company sell stock to officers, directors, or employees at a price lower than the current market price?</i>	Yes. See France Tab, Section III.	Yes. Shares can be sold to employees (not directors) through stock-option programs at reasonable prices lower than the current market price.	Yes. Shares may be issued at any price to employees (not directors or officers) provided the price is not lower than the par value.

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>d. Are transactions with affiliates required to be disclosed to the public or regulators?</i>	Yes. For employee stock options or purchase or subscription plans, a prospectus must be approved by the Commission des Opérations de Bourse; annual reports also must be filed.	No. Not unless the corporate articles require it.	Yes. Stock transactions with affiliates must be disclosed to the public or regulators in certain circumstances. Share ownership by directors, auditors, the general manager, and other affiliated companies must be included in the financial statements.

## IV. Enforcement of Shareholder Rights

	France	Germany	Italy
A. Responsibility of the Board of Directors:			
<i>a. Is there a body of law that requires the board of directors to represent the interests of the shareholders of the company?</i>	No.	Yes. German law states that the management board and supervisory board have to represent the interests of the shareholders.	No. Directors are required to act in the best interests of the company as a whole, including shareholders.
<i>b. Can directors be held liable for breach of fiduciary duty?</i>	Yes.	Yes.	Yes.
B. Enforcement of Rights by Local Regulators:			
<i>a. Is there a regulatory agency or stock exchange in the country that oversees shareholders' rights?</i>	Yes. The French stock exchange supervisory commission tends to play an active role in some aspects of the protection of shareholders' rights.	No. There is no body of law requiring regulators to protect the rights of shareholders.	No. There is no regulating agency that focuses solely on shareholders' rights. However, protection of investors is part of the general mandate of the Italian National Securities Exchange, the Bank of Italy, and the Italian Stock Exchange.

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>b. In practice, does the regulatory agency or stock exchange play an active role in enforcing rights?</i>	Yes. The French stock exchange supervisory commission tends to play an active role in some aspects of the protection of shareholders rights.	No.	No. Regulatory agencies play a less active role in enforcing rights than regulatory agencies in the United States.
C. Enforcement of Rights through the Judicial System:			
<i>a. What legal measures are available to shareholders if they believe their rights have been violated?</i>	A shareholder may seek relief before a French or foreign court and can file a complaint with the stock exchange supervisory commission if the alleged offense is within the commission's jurisdiction.	Redress for violation of shareholder rights generally is limited to passage of a resolution by the shareholders at a shareholders meeting. An individual shareholder can file a lawsuit in the courts for "fair and reasonable" compensation in the event of a merger or to contest the passage of a shareholders resolution that is in violation of the law or the corporate articles. See Germany Tab, Section IV.C.	Shareholders representing 10% of the capital of a non-listed company or 5% of the capital of a listed company can petition a court to conduct an investigation if they believe there are irregularities in the manner in which the directors are conducting business. In addition, any shareholder can bring a lawsuit against the company or the directors if they have engaged in unjust actions.
<i>b. Must shareholders exhaust remedies with the company first?</i>	No.	No.	No.

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>c. Can a minority or foreign shareholder bring a “derivative suit” on behalf of company?</i>	Yes.	Under the German Stock Corporation Law, derivative suits are very limited and highly unusual.	Yes. Shareholders holding 5% of the capital of a company may bring a derivative suit against the directors on behalf of the company.

## V. Financial Information and Auditors

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>a. Are there laws and regulations governing the preparation of financial reports?</i>	Yes. See France Tab, Section V.	Yes. See Germany Tab, Section V.	Yes. See Italy Tab, Section V.
<i>b. Are such reports publicly available?</i>	Yes.	Yes. At the request of the shareholder.	Yes.
<i>c. Can a shareholder request such reports?</i>	Yes.	Yes.	No. Shareholders can view annual financial statements at the company's offices.
<i>d. Are the reports available on a timely basis?</i>	Yes.	Yes. They are available annually prior to the shareholders meeting, and twice a year for listed companies.	Yes.
<i>e. Are there rules imposing standards on auditors?</i>	Yes. See France Tab, Section V.	Yes. Auditors must be independent from management; they are elected each year at the shareholders meeting.	Yes. Auditors generally must be independent. Auditors must be chosen from a list of firms on a special register and must be appointed by shareholders. There are rules governing the selection, resignation, and termination of auditors.



## VI. Depositary Receipts/Nominee Rights

	France	Germany	Italy
<i>a. Are holders of ADRs or EDRs recognized as the holders of the securities underlying the depositary receipt program?</i>	No. In general, issuers of ADRs or GDRs will register themselves or a third-party custodian as owners of the shares.	Yes.	No.
<i>b. Are ADR holders permitted to vote at a shareholders meeting? What requirements apply?</i>	No. Only the issuers or custodians of the ADRs are permitted to vote at shareholders meetings. A custodian could delegate authority to the ADR holder to vote only if the ADR holder is already a shareholder.	Yes. They can attend and vote at shareholders meetings. In practice, the custodian would give the holder an invitation or entrance/voting card.	No. However, the depositary agreement may contain provisions to permit the holders to (i) withdraw the underlying shares from the ADR program and become holders of the shares and vote the shares, or (ii) have the underlying shares temporarily registered in the holders' names to allow the holder to vote.
<i>c. Can the holders of ADRs enforce their rights against the company, or must they seek redress through the entity that put the ADR program together?</i>	No. Holders of ADRs have no rights against the company; they must enforce rights against the entity that put the ADR program together.	Holders of ADRs can enforce their rights to the same extent as regular shareholders.	No. Holders of ADRs have no rights against the company; they must enforce rights against the entity that put the ADR program together.

## VII. Corporate Governance Codes

	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<i>Has the government of your country, local stock exchange, or SRO adopted a Code of Conduct or Corporate Governance Code?</i>	No. However, two reports of recommendations have been issued by the Committee on Corporate Governance (in 1995 and 1999).	Yes. The German Corporate Governance Code is applicable to stock-exchange listed companies.	Yes. The Italian Exchange has adopted a Code of Conduct for listed companies, containing “best practice” recommendations. Listed companies must report whether the company has adopted the practices of the Code.



# Europe

France

# France

This memorandum was prepared based upon information received from the Paris, France office of Dechert.<sup>1</sup> The information contained herein is current as of July 1, 2000.

## I. Rights of Shareholders<sup>2</sup>

### A. Share Ownership

The general rule is that voting rights are proportional to the amount of shares held and each share entitles its owner to at least one vote. However, a company's articles of association or bylaws may limit the number of votes that may be exercised by a shareholder, provided the limitation extends to all classes of shares. For example, voting rights above a certain percentage of shares (such as 2%) could be restricted.

Preferred shares may be issued subject to certain conditions. These shares may include double voting shares (each share carries two votes), preferred shares with enhanced dividend rights, and preferred non-voting shares.

Investment certificates and voting certificates also may be issued in certain circumstances where the financial and non-financial rights relating to the shares have been separated. The investment shares contain the financial rights and the voting shares contain the non-financial rights.

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<sup>1</sup> The main legislative provisions regarding corporate governance issues are French Law No. 66-537 of July 24, 1966 and French Decree No. 67-236 of March 23, 1967.

<sup>2</sup> Information in this section is based primarily on French Law No. 66-537 of July 24, 1966 and French Decree No. 67-236 of March 23, 1967.

## B. Voting Rights of Shareholders

Voting is determined on the basis of the general rule outlined above, subject to very limited exceptions. Voting rights may be altered in a number of cases, the main cases being as follows:<sup>3</sup>

(i) A company's articles of association or bylaws may limit the number of votes that may be exercised by each shareholder, provided that such limitation is extended to all other categories of shares, except preferred non-voting shares;

(ii) Shareholders may vote to amend the voting requirements set forth in a company's articles of association or bylaws, thereby altering voting rights;

(iii) Double voting shares may be provided for in the articles of association and subsequently approved by shareholders at an extraordinary shareholders meeting. Such shares must be fully paid-up and have been in the name of the same shareholder for the previous two years. Double voting shares also may be voted following an increase in capital. Double voting rights are lost if the shares are converted to bearer shares or transferred to a new owner (except in cases of succession, gift, merger, or split-off). Double voting shares only may be held by French and European (European Union members) shareholders; and

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3 *Voting rights also may be altered in the following cases:*

*(i) Voting rights are lost in certain "cross-shareholding" situations. If company A has acquired more than 10% of the share capital of company B, company B must refrain from acquiring shares of company A. However, if company B already has shares in company A or subsequently acquires shares in company A, the situation must be regularized, so that neither company owns more than 10% of the other company. This can be achieved either by agreement between the companies, or by the company holding the smaller proportion of shares in the other company selling the shares illegally held. Until this has occurred, there are no voting rights attached to such shares;*

*(ii) There are no voting rights attached to "self-regulatory" shares. When voting rights in company A are held by one or more companies which company A controls either directly or indirectly, such voting rights may not be exercised at shareholders meetings of company A;*

*(iii) Where a company has purchased its own shares, no voting rights are attached to such shares;*

*(iv) No voting rights attach to shares acquired in breach of the rules relating to the compulsory filing of a takeover bid;*

*(v) Corporate officers who are personally bankrupt or prohibited from managing a company are not entitled to exercise their voting rights, nor are bankrupt shareholders; and*

*(vi) Shareholders may be deprived of their voting rights where they have a personal interest in having a particular resolution adopted, e.g., a resolution relating to approval of a contribution in kind or the granting of a benefit.*

(iv) The articles of association may provide for the creation of preferred non-voting shares, but only when the company has had distributable profits for its two preceding fiscal years.

Voting rights are completely withdrawn in certain cases, including the following:

- (i) A shareholder no longer has the right to vote at an ordinary meeting where, despite having received thirty days' notice to make the relevant payments, such shareholder still owes outstanding sums on the shares;
- (ii) There are no voting rights at ordinary meetings for bearer shares that are not registered with approved brokers;
- (iii) No voting rights attach to bearer shares that have not been converted to nominative shares when a company is de-listed; and
- (iv) Voting rights are lost for certain “ungrouped” shares. Where grouping of shares (i.e., replacing several shares of low nominal value by one share of a greater nominal value) has been approved at an extraordinary shareholders meeting, voting rights are lost for those shares that have not been submitted for regrouping within two years from the start of the regrouping process.

As stated above, preferred non-voting shares can be created only when a company has had distributable profits for its two preceding fiscal years. The articles of association may provide for the creation of such shares in an ordinary shareholders meeting. The number of such shares is limited to one quarter of the share capital of a company. It is a penal offence for the chairman, directors, general managers, and members of either the directorate or the supervisory board to own such shares.<sup>4</sup> If the preferential dividends for three fiscal years have not been paid in full, such shareholders have the right to acquire, in proportion to the amount of capital represented by these shares, a right to vote equal to that of other shareholders. Furthermore, in the event of the liquidation of the company, the shareholders, including holders of preferred non-voting shares, are convened to a meeting at the end of the liquidation proceedings to approve the liquidation accounts.

Preferred non-voting shareholders also have the ability to vote on a decision modifying the rights of such shareholders at a special meeting of the preferred non-voting shareholders. The quorum for a special meeting is shareholders present or representing at least 50% of the preferred non-voting shares on first call, and shareholders present or representing 25% of the preferred non-voting shares on second call. A special meeting of preferred non-voting shareholders may be called by the board of directors or the directorate of the company. The meeting also may be called by the statutory auditors, the liquidators, or an agent appointed by a court at the request of shareholders holding one-tenth of the preferred non-voting shares.

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<sup>4</sup> French corporations (sociétés anonymes) (“SAs”) may be managed by a board of directors or by a two-tiered structure composed of a directorate and a supervisory board. In the former structure, the day-to-day management is carried out by the chairman of the board of directors under the supervision of the board, and in the latter structure, the day-to-day management is carried out by the directorate under the supervision of the supervisory board. Most French companies use the former management structure.



Cumulative voting is not permissible.

## C. Shareholders Meetings

### 1. Record Date

The practice of using record dates in order to be entitled to vote or receive a dividend is not recognized under French law. Holders of nominative shares (i.e., shares registered in the name of the ultimate shareholder) may vote at shareholders meetings provided that they produce certification from the company that the shares have been registered in their name. The articles of association may provide for a limit as to the registration date, which must not be more than five days before the date of the shareholders meeting. If the articles of association do not provide a limit as to the registration date, shareholders must register their shares at least five days before the meeting.

With respect to bearer shares, which are registered in accounts and managed by intermediaries such as banks, a certificate from the intermediary must be produced, confirming the non-transferability of the shares until the date of the shareholders meeting. The articles of association stipulate the date by which such certificate must be produced, which may not be less than five days before the date of the shareholders meeting.

If the articles of association set a time limit by which shares must be registered, the shares are then blocked by the company and may not be transferred between the registration date and the date of the shareholders meeting. The blocking period may not exceed five days.

If the shareholders meeting is adjourned because a quorum has not been reached, a new meeting must be convened which will require the shares to be blocked again. Although the law gives no guidance on this matter, in practice, if the meetings are held in close succession, the blocking of the shares may be maintained in the period between the two meetings for administrative convenience.

### 2. Notice Requirements for Shareholders Meetings

Certain preliminary and final notice requirements must be met prior to a shareholders meeting. The rules vary depending on whether the company is listed or unlisted. The notice periods may not be shortened, although they may be lengthened. Notices must include the identification of the entire agenda, date, and location of the meeting. Notices are printed only in French, unless otherwise required by the articles of association.

#### Preliminary notice of shareholders meetings

For unlisted companies, at least 35 days' notice of a shareholders meeting must be given only to those shareholders who have asked to receive notice. Notice is given by a recorded delivery letter.

For listed companies, at least 30 days' notice of a shareholders meeting must be given to all shareholders. Notice is given by publication in the *Bulletin des Annonces Légales Obligatoires* ("BALO"), a legal announcements journal. Although not legally required, the *Commission des*



*Opérations de Bourse* (“COB”) has recommended that an announcement also be made in a newspaper. Generally, the announcements are found in a financial or economic publication, such as “*Les Echos*” or “*La Tribune*.”

#### Final call of shareholders meetings

For both unlisted and listed companies: 15 days (first call); six days (second call; *i.e.*, applicable if no quorum is reached at the first meeting). However, the 15-day notice period may not be extended to more than 25 days. For unlisted companies, notice is given by ordinary letter. For listed companies, notice is given by placing an announcement in a legal journal and by ordinary letter if there are nominative shares.

No special notice requirements are imposed by law for American Depositary Receipt (“ADR”) or Global Depositary Receipt (“GDR”) programs; however, they may be provided for in the articles of association.

With respect to the agenda of the shareholders meeting, the general rule is that the meeting is limited to the agenda specified in the final notice to shareholders and shareholders only may deliberate on this agenda. Any decision made in contravention of this rule is null and void. It should, however, be noted that: (i) a shareholders meeting may in any circumstances revoke the appointment of directors and members of the Supervisory Board and proceed with their replacement; and (ii) a shareholders meeting may vote on “other business” not included on the agenda provided that the other business is of minimal importance.

### **3. Shareholder Proposals**

One or more shareholders with voting rights representing at least 5% of the capital stock of an SA with share capital equal to or below FRF 5 million is entitled to request the inclusion of proposed resolutions on an agenda of a shareholders meeting.

With respect to SAs with a share capital exceeding FRF 5 million shareholders representing a specified portion of capital stock are entitled to request the inclusion of proposed resolutions on an agenda of a shareholders meeting. The specified portion of capital stock is reduced according to a sliding scale as follows: (i) 4% for the first FRF 5 million; (ii) 2.5% for the portion of capital between FRF 5 million and FRF 50 million; (iii) 1% for the portion of capital between FRF 50 million and FRF 100 million; and (iv) 0.5% for any remaining capital.

For listed SAs, an “association of shareholders” also may request a proposed resolution to be included on the agenda. The right to create an association of shareholders is open to shareholders who can prove they were registered shareholders for at least two years and who together hold 5% of the voting rights (or less, according to a sliding scale discussed above).

There are no procedural and/or substantive limits on what proposals a shareholder may submit. Shareholders may request the inclusion of any resolutions on the agenda, even if they have no connection with the agenda prepared by the board of directors. If the proposed resolution relates to the presentation of a candidate for the board of directors, it must be accompanied by further information concerning

the candidate (including his name, age, business references, professional activities during the last five years, and current and prior positions in other companies).

A request to place a proposed resolution on the agenda must be sent to the registered office of the SA by registered letter with a return receipt. The text of the resolution, which may include a separate brief statement as to why the resolution should be included on the agenda, must be attached to the request. For listed SAs, the request must be made within ten days from the date of the publication of the notice published in the BALO announcing the date of the shareholders meeting. For unlisted SAs, the request must be sent at least 25 days prior to the date of the shareholders meeting.

A shareholders meeting may be called by a majority of shareholders (in capital stock or in votes) with respect to (i) a public offer to purchase shares, (ii) a public offer to exchange shares or (iii) a control block sale, in the event of a failure of the board of directors to call such a meeting. In any other case, the shareholders may not call for a special meeting on their own. They only can request that a court appoint an agent to call a shareholders meeting. The request must be filed by one or more shareholders who together hold at least one-tenth of the corporate capital to which voting rights attach or by an “association of shareholders” (described above) if the SA is listed. The majority shareholders must comply with the rules governing the calling of any shareholders meeting regarding, in particular, the time limits. In practice, the courts respond favorably to such requests where the refusal of the board of directors to call a shareholders meeting may prejudice the company.

#### **4. Proof of Shareholder Status**

Any shareholder is entitled to attend a shareholders meeting. Any provision contrary to this rule is null and void. However, a shareholder must be able to prove such status as a shareholder of the SA. Nominative shareholders that are listed on share registers maintained by the SA at its registered office satisfy this requirement. Bearer shareholders, whose shareholdings are listed on a register kept by a financial intermediary, must obtain a certificate from such intermediary attesting to the ownership and that the shares will be non-transferable until the date of the meeting. Physical possession of the shares is not required in order to vote.

If the shares belong to an investment fund organized as a corporate entity (such as a mutual fund), the voting rights belong to the investment fund. If the shares belong to an investment fund organized as a contractual scheme (which does not have a board of directors or officers), the voting right belongs to the management company, which represents the funds in relation to third parties.

With respect to an omnibus account, such as a broker or bank custodian, the holding of shares in such an account prevents the actual shareholder from voting in person because he is not registered as a shareholder. In practice, the ultimate shareholder may instruct the person in whose name the shares are registered on how to vote, although the shareholder’s instructions may be disregarded. If a custodian or

other entity holding shares in an omnibus account votes the shares it holds, it should be possible for the custodian or other entity to vote some shares for and other shares against the same proposal. There is some debate on this topic among legal commentators. However, according to the National Association of Joint Stock Companies,<sup>5</sup> certain commentators believe that because a shareholder has the right to designate several proxies, each to vote with respect to a portion of its shares, a shareholder acting on its own behalf likewise should be able to vote certain of its shares for a proposal and certain of its shares against the same proposal.

In certain circumstances, custodians may not wish to vote shares of securities held by the custodian as a result of the concern that the custodian may be considered to be the beneficial owner of the shares, and therefore subject to certain laws regarding disclosure of shareholdings.<sup>6</sup> It may be possible, however, for the beneficial shareholder to negotiate a mandate to vote directly with the custodian.

In the case of so-called “dismembered” shares, unless otherwise provided in the articles of association, the voting rights attached to such shares belongs to the beneficiary at ordinary shareholders meetings and to the remainderman at extraordinary shareholders meetings.<sup>7</sup> A pledge of shares has no consequence on the voting right; the voting right is still exercised by the owner of pledged securities.

## 5. Attendance at Shareholders Meetings

In general, a shareholder has the right to participate at ordinary and special shareholders meetings. Any clauses contrary to this principle in the articles of association are null and void, and persons who attempt to prevent shareholders from participating in an ordinary shareholders meeting may be subject to imprisonment of up to two years and/or a fine of up to FRF 60,000.

However, there may be contractual limitations imposed on attendance at a shareholders meeting. The articles of association can provide that a minimum number of shares are required for a shareholder to participate in ordinary shareholders meetings. The minimum amount of shares cannot exceed ten shares, and shareholders may group together in order to satisfy the minimum number.

In general, only the record owner of shares is considered to be a shareholder. However, shareholders may be represented at shareholders meetings and have their voting rights exercised by their representatives under certain conditions. Legal entities may be represented by the

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5 *The National Association of Joint Stock Companies is an authoritative body made up of representatives of French companies, professors, lawyers, and other parties interested in representing companies vis-à-vis public authorities and, among other things, proposing modifications of law.*

6 *Article 440-2 of the French Law No. 66-537 of July 24, 1966 requires that the person who represents himself as being a shareholder while not being the beneficial owner of the shares may be subject to imprisonment or fines.*

7 *A “dismembered” share refers to a share in which a life interest (“usufruct”) and remainder interest (“nue propriété”) are created in the same share. The usufruct owner has the right to dividends, the right to vote, and the right to participate in ordinary shareholders meetings. The remainderman has the right to participate in extraordinary shareholders meetings. It should be noted that a company’s corporate articles may provide different rights for “dismembered” shares, or the usufruct owner and the remainderman may change the allocation of rights to vote.*

persons legally entitled to represent them in relation to third parties (e.g., chairman of the board of directors) or by a person empowered to do so. Such delegation is given for one meeting. However, it may apply to ordinary and special meetings held on the same day or to meetings with the same agenda. In addition, a shareholder may represent another shareholder at a shareholders meeting.

The shareholder also may decide to vote by mail. Voting by mail is permitted for all shareholders meetings and is carried out by means of a special form prepared by the company and sent to the shareholders requesting it or at the initiative of the company. Each resolution must be presented separately, and the shareholder must be able to vote in favor of, to vote against, or to abstain (which is equal to voting against) from voting on the resolution. The mail voting form must be signed by the shareholder, however, a third-party custodian signs on behalf of the shareholder. The shareholder also may use a blank proxy, in which case the chairman of the meeting will vote such shares covered by the proxy in favor of any resolution presented or approved by the board of directors and against the other resolutions.

There is no equivalent of beneficial owners under French law.<sup>8</sup> The closest analogy may be to investors who purchase shares through a bank, brokerage firm, custodians, or investment fund in which the shares belonging to many persons are grouped in a fund. In such cases, the voting rights are deemed to belong to the bank, broker, custodian, or management company, which represents the fund in relation to third parties. Nevertheless, it is frequently recognized in practice, particularly in situations where the beneficial owners are not French, that the nominal shareholder may vote in accordance with instructions from the beneficial owners.

Shareholders must present certain documents, including certification of their shareholding, to justify their status as shareholders. In order to facilitate entry and avoid ID verification, certain companies send admission cards to their shareholders. Representatives of legal entities must bring a copy of the court/corporate decision naming them as such. Although not provided for under the law, these documents, if written in any other language, should be translated into French.

Shareholders may ask written questions from the time of the final notice of the shareholders meeting until the date of the meeting. There is no limit on the number of questions shareholders may ask. However, such questions must be related to the agenda of the shareholders meeting. Although the law does not provide specifically for the right, shareholders of listed companies frequently ask questions that are not covered on the agenda and to which management generally will respond. The board of directors or members of the Directorate must respond to such questions during the meeting. The board of directors therefore should be present at the shareholders meeting to answer last-minute questions. The responses are summarized in the minutes of the shareholders meeting. During the meeting, shareholders also may participate in the debates, give their opinion, and ask for additional explanations to their questions.

No provisions exist that specifically prevent a shareholder from bringing a translator to the meeting. However, attendance at shareholders meetings strictly is limited to shareholders. Other persons, such as financial journalists or counsel (lawyers, accountants, technicians), may be useful in certain cases to explain certain questions. But their presence is never a right and must be authorized by the “bureau” of the

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8 A “beneficial owner” is the owner of a security registered in another’s name (such as in the name of the broker).

meeting (composed of the president of the shareholders meeting; two observers, who are usually the two shareholders possessing the largest number of votes; and a secretary) or by the meeting itself. It therefore is advisable to ask for prior permission from the bureau of the meeting to bring a translator to the meeting.

## 6. Proxy Voting

As stated above, shareholders that do not attend the meeting have three possible means of voting: (i) the shareholder can give its proxy to another shareholder, who must attend the shareholders meeting and vote in person; (ii) the shareholder can vote by mail, in which case it must request a special form to do so at least six days before the date of the meeting; or (iii) the shareholder can send a blank proxy to the company. As noted above, the person in whose name the shares are registered is considered the shareholder. Therefore, if shares are registered in the name of a nominee, the nominee has the right to vote the shares. The nominee can delegate the right to attend a meeting and vote as a proxy to the beneficial owner of the shares only if the beneficial owner also is a shareholder (because a proxy can be given only to another shareholder).

Foreign investors do not need to be represented by a local attorney or other representative in order to vote at a meeting either in person or by proxy. If foreign investors wish to vote by proxy through a delegate or other representative, the proxy must be completed and signed by the shareholder and include the shareholder's address in order for the votes to be counted at the meeting. Proxies must have a tax stamp of FRF 5.

A person voting on behalf of another shareholder must do so personally and cannot sub-delegate his proxy. The articles of association may impose a limit on the maximum number of votes that any one person may have either in his own name or as proxy. A proxy acting on behalf of more than one shareholder can vote in favor of a proposal on behalf of one client and against that same proposal on behalf of another client.

## 7. Quorum

The required quorum varies depending upon the type of meeting being held.<sup>9</sup> An ordinary shareholders meeting is validly held if, when the meeting is initially called, the shareholders present or represented hold at least one-quarter of the shares having the right to vote. At the second call, no quorum is required.

An extraordinary shareholders meeting is validly held if, at the first call, the shareholders present or represented hold at least one-third of the shares having the right to vote. At the second call, the shareholders present or represented must hold at least one-quarter of the shares

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<sup>9</sup> Generally, extraordinary meetings are meetings of all shareholders at which decisions necessitating a modification of the by-laws are made (including, for example, a change in the registered office of the company or a sale of a substantial amount of the assets). A special meeting is a meeting called only for one class or category of shares.

having the right to vote. In the absence of this latter quorum, the second meeting is adjourned to a date no more than two months after the date for which it had been called.

A special shareholders meeting is validly held if, at the first call, the shareholders present or represented hold at least one-half of the shares having the right to vote. At the second call, the shareholders present or represented must hold at least one-quarter of the shares having the right to vote. In the absence of this latter quorum, the second meeting is adjourned to a date no more than two months after the date for which it had been called. In any event, only the shares that have the right to vote are included in the calculation of the quorum. The quorum must be maintained throughout the meeting, resolution by resolution. Any meeting that is held without a quorum is null and void.

The bureau of the shareholders meeting determines whether a quorum is obtained. There are no other specific procedural requirements for this determination. The requirements to reconvene the meeting are exactly the same as those for the first call, except for the six-day notice period required for the second call, as opposed to fifteen days for the first call.

## 8. Voting and Supermajority Provisions

All resolutions of ordinary shareholders meetings, such as approval of annual corporate accounts, distribution of dividends, appointment or removal of directors from the board, and appointment of statutory auditors, are adopted by a simple majority of shares voting. All resolutions of extraordinary shareholders meetings, such as increase or decrease of capital, change of corporate name, change of registered office, and extension of the corporate object, are adopted with a two-thirds majority of shares voting. Supermajority requirements cannot be imposed by the articles of association for either ordinary or extraordinary shareholders meetings. However, shareholders unanimously can decide to enter into a shareholders agreement (*pacte d'actionnaires*) among themselves, in which they may decide that certain resolutions must be adopted by a supermajority vote.

In the following two circumstances, French legislation requires a unanimous shareholder vote during an extraordinary shareholders meeting: (i) change of nationality of the SA by transfer to a foreign country of the registered office of the SA (unless the foreign country has signed a specific convention with France allowing the SA to acquire the nationality of such country without losing its legal capacity), and (ii) increase of the undertakings of the shareholders (*i.e.*, increase the par value of the shares or convert the SA into a company in which the shareholders are jointly and severally liable for all debts).

## 9. Voting Tabulation and Results of Shareholders Meetings

There are no provisions under French law as to how to count shareholder votes. Unless otherwise provided for in the articles of association, the shareholders may vote by a show of hands, by roll call, or by written bulletin, as determined by the bureau of the shareholders meeting and ratified by the shareholders. Secret voting is permitted if provided by the articles of association. Once the vote has taken place, the counting is made by the bureau. With companies having a substantial number of shareholders attending a shareholders meeting, electronic reading devices are sometimes used to count the votes. As long as the shareholders meeting has ratified (normally by a simple majority) the

method of counting determined by the bureau of the meeting, one shareholder does not have the right to demand a formal counting. The shareholder only can make a claim for damages if he can establish that the determination of the method of counting was chosen by the bureau to the detriment of the shareholder and with the intention of causing harm to the shareholder.

If shareholders fear that there may be problems during the meeting, they may ask the President of the Commercial Court for the place of the meeting to appoint a bailiff. A bailiff is in charge of preparing a transcript of the debate. The President of the Commercial Court will appoint a bailiff only if the shareholders can convince the court that the regular functioning of the SA is or may be impeded.

Minutes of the shareholders meeting must be prepared after each meeting on specially stamped official papers. The minutes must contain certain information including the date and place of the meeting, the agenda, the number of shares participating, the quorum reached, a summary of the discussions, the text of each resolution, and the result of the voting. Shareholders have the right to access the minutes of shareholders meetings (as well as the attendance sheet of such meetings) held during the last three fiscal years. There are no specific rules governing the procedure to request access to the company's records regarding the results of voting at a shareholders meeting. The only provisions contained under French legislation in such regard are that: (i) the documents are to be kept at the registered office of the SA, (ii) shareholders may make copies of the documents, and (iii) shareholders may be assisted by an expert named on a list established by the courts.

#### D. Rights of Minority Shareholders in Corporate Transactions<sup>10</sup>

French law protects minority shareholders in various ways, depending on the amount of shares the minority shareholder holds in the company.

A shareholder holding at least one share of a company may:

- submit any written question to the board of directors before a shareholders meeting;
- ask the court to appoint an agent who will convene a shareholders meeting in urgent circumstances;
- prevent the adoption of certain resolutions or decisions related to the company, whenever unanimity is required; and
- bring a derivative action against the directors of the company.

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<sup>10</sup> Information in this section is based primarily on French Law No. 66-537 of July 24, 1966; French Decree No. 67-236 of March 23, 1967; French Law No. 96-597 of July 2, 1996, and public takeover regulations (*Règlement Général of the Conseil des Marchés Financiers*).

A shareholder (or group of shareholders) holding at least 10% of the share capital of a company also may:

- address written questions to the chairman of the board of directors or to the directorate twice per fiscal year, related to facts that may compromise the continuity of the business;
- ask the court to withdraw or revoke the appointment of the statutory auditors;
- ask the court to appoint a management expert;
- ask the President of the Commercial Court to liquidate the company; and
- require consolidated accounts to be prepared, if appropriate, even if the company is controlled by another company, which includes the company in its own consolidated accounts.

A shareholder holding more than 25% of the share capital of a company also may:

- prevent the change of an SA into a limited liability company.

A shareholder holding more than one-third of the share capital of a company may:

- prevent any modification of the articles of association.

French law protects minority shareholders when another company or group takes control over the company, although the level of protection may depend on whether the company is listed or unlisted. Any party wishing to acquire enough shares to give it control of a listed company is subject to regulations regarding takeover bids, which protect minority shareholders. With respect to unlisted companies, no specific protection is granted.<sup>11</sup>

In addition, shareholders of listed companies who can prove that they have held nominative shares for at least two years, and who together hold at least 5% of the voting rights of a company with capital greater than FRF 5 million, may form an “association” to represent their interests in the company. This percentage is reduced according to a sliding scale as follows: 4% for a company with capital between FRF 5 million and 30 million; 3% for a company with capital between FRF 30 million and 50 million; 2% for a company with capital between FRF 50 million and 100 million; and 1% for a company with capital over FRF 100 million. The shareholders associations may: (i) ask the court to convene an ordinary shareholders meeting; (ii) require the inclusion of draft resolutions on the agenda for a shareholders meeting; (iii) ask the court to revoke, on justifiable grounds, the appointment of one or more statutory auditors appointed at an ordinary shareholders meeting; (iv) ask the court to appoint an expert to report on one or more management transactions; (v) ask written questions of the company’s managers relative to any fact that may compromise the continuity of the company’s business; (vi) ask the court to revoke the appointment of the statutory auditors in event of fault or impediment; and (vii) initiate litigation against the directors of the company.

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11 However, the Court of Appeal of Paris has considered that the takeover bid procedures also may be used for such companies (CA Paris, 1st Chamber, November 18, 1977).



A company's articles of association may provide that a shareholder's shares will, in certain circumstances, be subject to mandatory redemption or sale. However, legal scholars have suggested that this type of provision is subject to certain limits. First, it simply cannot be used to exclude a shareholder without cause; there must be objective and precise criteria and significant facts relating to the shareholder's disruption of the running of the company (e.g., breach of the articles of association). Second, the body competent to decide upon the exclusion of a shareholder must be specified and a procedure allowing the shareholder to defend properly his rights must be established. Further, the conditions for the reimbursement to the shareholder of the value of his shares must be fixed. An excluded shareholder may institute court proceedings if such shareholder believes it has been wrongly excluded from the company.

With respect to companies that are listed, French law and public takeover regulations provide for a minority shareholder squeeze-out procedure that can be triggered by the majority shareholder who will be allowed to purchase all, but not less than all, of the shares belonging to the minority shareholders, irrespective of the minority shareholders' consent. This procedure normally will lead to a delisting of the company from the official stock exchange. The minority shareholder squeeze-out procedure only can be triggered by a majority shareholder, or by a group of shareholders acting together, holding at least 95% of the voting rights of the company. The share price is determined by the majority shareholder who initiates the squeeze-out procedure. This price must be based on an appraisal using a multi-criteria valuation and the valuation must be confirmed by an independent expert. The takeover provisions will not permit the squeeze-out procedure to proceed if the price offered is insufficient. All shareholders who are "deprived" of their shares must be offered the same price. In practice, the squeeze-out procedure consists of two parts. First, an offer is made to minority shareholders to surrender their shares at the price proposed by the majority shareholder. Second, the majority shareholders may force the minority shareholders out by paying the same price per share and sometimes more if, in the meantime, an event has occurred that would justify an increase in the price.

The sole mechanism for a minority shareholder to contest a management or majority shareholders decision is to initiate court action. A management decision can be challenged on the grounds of breach of fiduciary duty. A majority shareholders decision can be challenged on the grounds of "abuse of majority."<sup>12</sup> The sanction for "abuse of majority" is generally that the majority shareholder's decision is voided by the court. Depending on the situation, damages also may be claimed from the majority shareholder. Conversely, the courts have recognized that a blocking vote from minority shareholders may be abusive ("abuse of minority") and can hold shareholders liable for such action.

Dissenters or appraisal rights exist only in the case of companies that are listed and in a limited number of cases that are established by the takeover provisions summarized as follows:

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12 *The definition of "abuse of majority" as it is derived from case law is a decision that is contrary to the best interests of the company and made with the sole objective of favoring majority shareholders to the detriment of minority shareholders. For example, courts have found abuse of majority when a shareholders' decision granted exaggerated remuneration to the managers or allowed a parent company to cover all the liabilities of one of its subsidiaries that was managed by a person belonging to the majority shareholders group.*

- (i) Where at least 95% of the voting rights of a company are held by one or more majority shareholders acting in concert. Any of the minority shareholders having voting rights may petition the *Conseil des Marchés Financiers* (“CMF”) to decide that the majority shareholder(s) should be forced to make an offer to repurchase all of the shares held by the minority shareholders. When making its decision, the CMF must take into account the market conditions of the shares. In other words, the CMF will decide that the majority shareholder(s) must make an offer for the repurchase of the shares held by the minority shareholders when the market of the shares is illiquid or very far from reflecting the value of the shares;
- (ii) Where a French SA is transformed into a special type of company in which certain shareholders have unlimited liability and in which the management of the company is quasi irrevocable. The controlling shareholder(s) must make an offer to repurchase the shares held by the other shareholders;
- (iii) Where a decision involving a major modification of the articles of association is to be voted on by the shareholders (such as a decision modifying the corporate form of the company or limiting the rights of the shareholders to transfer their shares or limiting other rights attached to the shares). The controlling shareholder(s) must inform the CMF of the planned corporate transactions, and the CMF will decide if the majority shareholder(s) must make an offer to repurchase the shares held by the other shareholders once the CMF has considered the impact of the planned transaction on the minority shareholders rights; and
- (iv) Where the controlling shareholders decide to merge the company with its holding company, transfer or contribute a major part of the company’s assets to another company, substantially reorganize the company’s activities, or if there has been no dividend payment by the company for several years. The controlling shareholder(s) must inform the CMF of the planned corporate transactions and the CMF will decide if the majority shareholder(s) must make an offer to repurchase the shares held by the other shareholders once the CMF has considered the impact of the planned transaction on the minority shareholders rights.

## E. Transferability of Shares

There are no specific limitations on the ability of a foreign or minority shareholder to sell or transfer shares. The basic rule is that shares may be traded as soon as a company has been registered with the Commercial and Companies Registry or, in the case of an increase in capital, from the date of such an increase. However, there are a number of situations in which trading is restricted for all shareholders. For example, in the articles of association of unlisted companies, it is possible to include clauses limiting the free transfer of shares, such as prior approval clauses, preemption clauses, clauses prohibiting share transfers prior to the expiration of a certain period, and compulsory redemption clauses. These types of provisions may not be included in the articles of association of a listed company.

## F. Accounting

Every shareholder, regardless of the number of shares owned, has the right to access certain documents relating to the management and activities of the company. A shareholder can access documents prior to an ordinary shareholders meeting or at any other time. The request must be made directly to the company by mail. Depending on the request of the shareholder, the documents will then either be mailed to the shareholder or made available at the company's registered office.

### Access to Information Prior to an Ordinary Shareholders Meeting

Shareholders may obtain information: (i) when a proxy form is sent to the shareholder along with a certain number of documents; (ii) when certain documents and information are sent to the shareholder at his request; or (iii) when the shareholder inspects certain documents directly at the registered office. These documents include, but are not limited to:<sup>13</sup>

- (i) a brief statement of the condition of the company for the past year, along with a table showing the results of the company for each of the last fiscal years;
- (ii) the report of the board of directors;
- (iii) the annual accounts (balance sheet, income statement, and appropriate notes);
- (iv) the consolidated accounts; and
- (v) the statutory auditor's report.

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13 *These documents also include:*

- (i) the first and last names of the directors, general managers, or members of the supervisory board, as well as the companies in which these persons are managers, directors, or members;*
- (ii) the report on the management of the group;*
- (iii) a table of the allocation of results;*
- (iv) the comments of the supervisory board, if any;*
- (v) for listed companies, a detailed statement of the securities held by the company as investments;*
- (vi) in the event of appointment of directors, information on the candidates; and*
- (vii) in the event of merger or split-up, the reports of the board of directors and statutory auditors and, in the event of appraisal, the report of the appraiser.*

### Permanent Access to Information

Each shareholder has the right, at any time, to access to the following documents relating to the last three fiscal years:

- (i) the detailed statement of assets and liabilities;
- (ii) the annual accounts;
- (iii) the consolidated accounts, if applicable;
- (iv) the list of directors or members of the directorate or supervisory board;
- (v) the reports of the board of directors and of the statutory auditors;
- (vi) the text and statement of the reasons for the proposed resolutions;
- (vii) information concerning the candidates for the board of directors;
- (viii) the total amount of the compensation for the five most highly paid persons if the company employs less than 200 persons (this increases to the ten most highly paid persons if the company employs more than 200 persons);
- (ix) the amount of donations that are tax-deductible; and
- (x) the labor audits.

In obtaining this information, a shareholder always may request the assistance of an expert named on a list established by the courts. A shareholder also can be accompanied by a bailiff. A shareholder may even appoint an agent or representative to inspect the corporate documents. A shareholder has the right to make a copy of the documents, except for the statement of assets and liabilities. In the event a shareholder is refused access to documents, a shareholder may request an order from the President of the Commercial Court for the company to make the documents available, under penalty of a fine. Failure to make documents available to shareholders also may subject the chairman of the board of directors, directors, and officers to a fine of up to FRF 60,000.

### Appointment of Expert

One or more shareholders representing 10% or more of the share capital may request in court the appointment of an expert to draft a report on one or more management operations of a company. This request will be considered by the court in summary proceedings. If the request is granted, the expert's report will be communicated to the statutory auditor, the public prosecutor, the board of directors, and, for a publicly traded company, the COB.

## **G. Inspection Rights**

As outlined above, shareholders can inspect a wide variety of documents related to the company. In addition, a shareholder can obtain the articles of association from the company. When a shareholder requests the articles of association, the company also must attach the list of current directors and statutory auditors. The company may not request payment of more than FRF 2 to issue each document. Furthermore, a shareholder can obtain the articles of association as well as other corporate documents from the Registry of Commerce and Companies, subject to the payment of a small fee.

## **II. Payment of Dividends**

Dividends may be distributed from distributable profits, which are net profits after taxes. In most cases, a majority of the shareholders present or represented at an ordinary shareholders meeting declare dividends after (i) approving the SA's annual financial statements and (ii) determining that there is distributable income. However, if a balance sheet as of the fiscal year-end that has been certified by a statutory auditor shows that since the close of such fiscal year, the SA has made a profit, interim dividend payments may be distributed prior to the ordinary shareholders meeting convened to approve the annual financial statements. Interim dividend payments are declared by the board of directors. Different dividend payments and/or payment schedules are not permitted for minority and majority shareholders or domestic and foreign shareholders. Dividends are not required to be payable in local currency only.

Dividend distributions are never mandatory; i.e., even if there are distributable profits, the shareholders may decide not to distribute dividends. However, the articles of association may provide for the mandatory payment of a "first guaranteed dividend" (provided that the SA has profits to distribute). A first guaranteed dividend is interest on the amount of the SA's capital that has been paid on the shares but not redeemed.

The dividends for unlisted SAs are paid directly by the SA to the shareholder. The shares of listed SAs are usually bearer shares or kept in a nominative managed account and, therefore, the SA pays the dividends to the financial intermediaries who in turn pay the shareholders.

Every SA, whether listed or unlisted, must file with the clerk of the Commercial Court certain accounting documents within one month of the approval of the annual accounts by shareholders at an ordinary shareholders meeting. These documents include the proposed allocation of the results submitted to the shareholders meeting and the resolution voted on such allocation. These documents are publicly available. In

addition, every SA, whether listed or unlisted, must file with the French tax authorities information on the dividends distributed. Listed SAs also must publish the information in the BALO.

The terms for payment of the dividends voted by an ordinary shareholders meeting are established by the meeting, or, if not done so, by the board of directors. The dividends may be paid in cash, in shares (if authorized by the articles of association), or both. Shareholders at an ordinary shareholders meeting can decide whether each shareholder will receive all or part of the distributed dividends in cash or in shares.<sup>14</sup> An offer to pay the dividends in shares must be made simultaneously to all shareholders at the ordinary shareholders meeting approving the annual accounts. The request for payment of the dividends in shares must be made within a period fixed by the ordinary shareholders meeting, which may not be more than three months following the date of such meeting.

Cumulative dividends are permitted provided that the articles of association have expressly permitted them in accordance with the following rules. If the articles of association have provided for the mandatory payment of the first guaranteed dividend and, in addition, there is a stipulation to the effect that such dividends are cumulative, should the profits be insufficient to pay the entire first guaranteed dividend, the shareholders are then entitled to receive past-due first guaranteed dividends before any other dividend is paid. A clause in the articles of association is necessary to declare that the first guaranteed dividends are authorized and cumulative. Cumulative dividends are permitted under the same circumstances for preferred shares.

### III. Affiliated Transactions<sup>15</sup>

Some affiliated transactions are strictly forbidden, while others are partially regulated and still others are completely unregulated. Any agreements between an SA and one of its directors or general managers as well as agreements in which such persons have an interest require prior authorization by the board of directors. This authorization also extends to agreements between the SA and another company (including a foreign company) when either the director or general manager of the SA is an owner, full liability partner, manager, director, general manager, or member of the directorate or supervisory board of the other company.

The scope of these type of agreements is very broad, covering the full range of possible agreements entered into by the SA and its chairman of the board of directors, directors, or general managers. Agreements subsequently modified may require further authorization if the obligations of the SA are increased. Any relevant agreement entered into without obtaining the proper authorization may be annulled if it results in loss or damage to the SA. An action for annulment may be sought by the SA or any of its shareholders. The statute of limitations

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14 *When the dividends are paid in cash, payment must be made no later than nine months after the close of the fiscal year. An extension may be granted by the court. Dividends (with the exception of the first guaranteed dividend) must be paid in one installment, unless authorization by the French Ministry of Finance to pay in several installments is granted. If the dividends exceed FRF 5,000, they must be paid by check or wire transfer.*

15 *Information in this section is based primarily on French Law No. 66-537 of July 24, 1966 and French Decree No. 67-236 of March 23, 1967.*

for such action is three years from the date of the existence of the agreement becomes known. In addition, the party in violation may incur civil liability.

As mentioned above, certain other agreements are strictly prohibited. Directors, General Managers, their spouses, and permanent representatives of legal entities are not permitted to borrow money from the SA, obtain credit, or receive a guaranty from the company with respect to their obligations toward third parties. Finally, certain other agreements are completely unrestricted; *i.e.*, agreements that are carried out by the SA under normal business circumstances.

Except for the rules applicable to self regulation or reciprocal holdings, there are no restrictions on the ability of an officer or a director of a company to own more than a certain percentage of stock. However, with regard to employees, if a stock option plan is implemented by an SA, in order for the SA and its employees to benefit from certain advantageous tax and social security rules, the total number of options offered to employees but not yet exercised must not give rise to a right to subscribe to a number of shares greater than one-third of the share capital. Moreover, any employee already holding 10% of the share capital of the SA must not benefit from such a plan. These restrictions have been extended to the officers (chairman of the board of directors, general manager, members of the directorate) of the SA who may benefit from stock option plans but with the two limits described above if the advantageous tax and social security rules are to apply. The situation is the same if the employees are offered the opportunity to subscribe or acquire shares issued by a listed SA. To qualify for the advantageous tax and social security benefits, each employee must not, in any one calendar year, subscribe or purchase shares of a listed SA equal to more than half the ceiling fixed for that year for the calculation of social security contributions in any one calendar year.

When an SA implements a stock-option plan for its employees or officers, the price for subscription or purchase is set by the board of directors in accordance with the methods defined by the shareholders meeting on the basis of the special report drawn up by the statutory auditors. The price may not be less than 80% of the average of the quotations during the 20 trading sessions preceding the day on which the board of directors set such price. However, if the shares of the SA are unlisted, the price can be freely set by a shareholders meeting.

When the SA makes an offer to its employees to subscribe or purchase shares, the price for subscription or purchase is set by the board of directors in accordance with the methods defined by the shareholders meeting on the basis of the special report drawn up by the statutory auditors. The price may not be lower by more than 10% of the average of the quotations during the 20 trading sessions preceding the day on which the board of directors set such price. However, if the shares of the SA are unlisted, the price can be freely set by a shareholders meeting.

## IV. The Role of Local Regulators and Stock Exchanges in Enforcing Shareholder Rights

### A. Responsibility of the Board of Directors

French law does not require expressly that the board of directors of an SA (or the directorate, in the case where the company is administered by a directorate and a supervisory board) represent the interests of the shareholders of the company. Under French law, the board of directors only represents the company and must act in its best interests. The best interests of the company are not defined by statute and the case law does not clearly describe this concept. However, it is generally considered that the best interests of the company go beyond and are distinct from the interest of the shareholders.

With respect to breach of fiduciary duty, the directors can be held liable for violations of the legal or regulatory provisions that apply to an SA, for violations of the SA's articles of association, or for mismanagement. The concept of mismanagement is not defined by statute. The courts have found mismanagement in the case of incurring expenses beyond the company's resources, failure of the board to supervise the chairman of the board of directors, or allowing significant errors to remain on the company's balance sheet. Mismanagement generally is determined in light of what a normally prudent manager would have decided in a similar circumstance.

In practice, the instances in which directors have been held responsible for the breach of their duties are numerous. The general view is that the number of court cases in which the liability of directors, and especially the liability of the chairman of the board of directors, is challenged is increasing. However, situations where directors are held personally liable generally involve small- or mid-sized companies that have filed for bankruptcy. The cases where directors of major companies are held personally liable are less frequent (although it is the general view that the number of such cases is increasing) and generally involve a serious fraud alleged against such directors (such as personal enrichment, bribery, or granting unjustified advantages or favors to third parties). Generally, French law does not require a higher level of responsibility for the chairman of the board of directors as opposed to other directors. However, because the board only meets a few times a year and because the chairman theoretically exercises the day-to-day management of the company, the chairman is the director most frequently found liable.

### B. Enforcement of Rights by Local Regulators

French law does not require regulators to protect the rights of shareholders. Consequently, no regulatory agency oversees shareholder rights. The French stock exchange does not oversee shareholder rights. However, the COB tends to play an active part in some aspects of the protection of shareholders rights. One of the missions of the COB is to protect investors investing in publicly traded stocks and to oversee the financial information provided by companies whose shares are publicly traded. This broad mission has led the COB to issue regulations, as well as recommendations, in the areas of disclosure of financial and other information, insider trading, public tender offers, accounting, and ordinary shareholders meetings. The COB monitors compliance with its regulations through routine investigations or in response to shareholder complaints. The COB may intervene systematically when an alleged violation involves one of the areas mentioned above. The COB has wide-ranging investigative powers and may impose pecuniary sanctions.



The CMF is responsible more specifically for issuing regulations covering public tender offers and changes of control in listed companies.

### C. Enforcement of Rights through the Judicial System

A shareholder, regardless of the amount of capital such shareholder holds, who believes that its rights have been violated can, in the absence of any amicable settlement with the company, seek relief before a French (or foreign) court. There is no requirement that the shareholder exhaust any remedies with the issuer first. There is no administrative (*i.e.*, non-judicial) procedure to which a shareholder could resort. The shareholder could, however, file a complaint with the COB if the alleged violation is within the COB's scope of authority.

In some instances, it might be advisable for a shareholder to first seek an "expedited procedure." In an expedited procedure, shareholders who hold, in aggregate, 10% or more of the capital stock of a company can petition a court to have an independent expert appointed to perform an audit on one or several specific management operations. This procedure generally is referred to as "minority shareholders expert investigation."

Although suits brought by minority shareholders against a French company and their directors are less frequent than in the U.S., the French judicial system is not reluctant particularly to hear the claims of minority shareholders. In recent years, minority shareholders have organized themselves through various organizations such as the ADAM (Association des Actionnaires Minoritaires), and judicial suits brought by minority shareholders involving big companies are becoming more frequent. Such suits have been brought in situations of take-over bids, major restructurings, or minority shareholder squeeze-out operations (*i.e.*, in situations involving a substantial modification of the corporate or capital structure of the company and not in situations involving the day to day management of the company). Derivative action lawsuits against third parties cannot be brought in France, because under French law the person initiating the lawsuit must be a creditor of the person on whose behalf it brings the suit. A shareholder normally is not considered a creditor of the company in which it holds shares, except in the case of the company's liquidation.

## V. Financial Information and Auditors<sup>16</sup>

Commercial companies must maintain regular accounting procedures by establishing, at the end of each fiscal year, annual accounts and by determining, at least once every 12 months, the value of assets and liabilities of the company. For companies with at least 300 employees or an annual revenue of at least FRF 120,000,000, provisional accounting documents must be prepared and made available to the statutory auditors and the workers council twice a year: four months after the beginning of the fiscal year and 4 months following the closing of the first semester of the fiscal year. Companies whose registered office is located in France may use French francs or euros in their accounting documents and the text must be in French.

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<sup>16</sup> Information in this section is based primarily on French Law No. 66-537 of July 24, 1966 and French Decree No. 67-236 of March 23, 1967.

At the end of each fiscal year, the board of directors must prepare the annual accounts, which must include a balance sheet, an income statement, and appropriate notes that complete and comment on the information in the balance sheet and income statement. These accounts must be in conformity with the accounting rules and procedures in effect and must give a true and fair view of the company's financial situation and results. Accordingly, all risks and losses that have occurred during the fiscal year must be taken into account. Annual accounts must, unless an extension of time is granted by the court, be approved by an ordinary shareholders meeting within six months of the fiscal year-end.

Publicly traded companies are required to provide additional information. In particular, they must publish the following periodic financial reports in the BALO: (i) within four months of the end of the first semester, a semi-annual report of the company's revenue and activities during the period and projections of the company's performance certified by the auditor, and (ii) within 45 days of the end of every quarter, the net amount of the company's revenue.

Annual accounts are made available to the statutory auditor, the shareholders, and workers council. These accounts also are registered with the clerk of the Commercial Court, and are therefore available to the public within one month of their approval at an ordinary shareholders meeting. With publicly traded companies, yearly financial reports, which are required by the COB and which include all the information to be communicated to the shareholders prior to an ordinary shareholders meeting, as well as other information about the company, must be available to any person that requests it. Publicly traded companies also must publish the annual accounts in the BALO within four months of the closing of the fiscal year-end and 15 days before an ordinary shareholders meeting and must provide quarterly and semi-annual financial information.

Statutory auditors are required in all SAs. Two auditors are required when the company issues consolidated accounts. In addition, a substitute auditor must be appointed at the same time. There are general rules that impose standards on auditors; *i.e.*, the general accounting rules applicable to accountants and specific regulations from the National Council of Statutory Auditors. The duties of the statutory auditor include the verification of the accuracy of the information contained in the annual accounts and the compliance by the company with relevant law. The auditor is, however, not responsible for preparing the annual accounts. Furthermore, statutory auditors must report company violations that have a significant and deliberate effect on the corporate accounts to the public prosecutor. The sanction for not disclosing such information to the public prosecutor is imprisonment of up to five years and a fine of up to FRF 200,000. Accordingly, the auditor may launch an "alert procedure" in cases where the financial health of the company is questionable; *e.g.*, the auditor may uncover an act that might compromise the continuity of the company. In such a case, the auditor must inform the chairman of the board of directors and request an explanation. If an insufficient or no explanation is given, the auditor must then (i) request that the chairman convene a board of directors meeting within eight days and (ii) inform the President of the Commercial Court and the workers' council of the alert procedure. If the financial health of the company remains questionable, the auditor must draft a special report to be presented at the next shareholders meeting. Finally, statutory auditors have a general obligation to give information to the board of directors, especially with respect to any irregularities and inaccuracies that they have discovered.

There also are specific rules that require the auditors' independence from management. Only the persons named on a special statutory auditor list may carry out the functions of a statutory auditor. Furthermore, the functions of a statutory auditor are incompatible with any

activity that may prejudice the independence of the auditor. Moreover, in order to preserve the independence of the statutory auditors from the company or its directors, certain persons having significant associations with the company are prevented from being statutory auditors. The sanctions for not complying with these provisions are imprisonment of up to six months and/or a fine of up to FRF 60,000. These sanctions are applicable even if the irregularities are committed within a subsidiary located abroad.

The following is a summary of the rules governing the selection, termination, and resignation of statutory auditors:

#### Selection

At the time of formation of the company, the first statutory auditors are named either in the articles of association or by an ordinary shareholders meeting. Subsequent appointments also are made by an ordinary general shareholders meeting. This appointment must be placed on the agenda of the meeting; otherwise the meeting can be declared null and void. In publicly traded companies, the COB must be informed of the candidacy of the auditor. The auditor must accept its duties. The appointment needs to be published in a journal of legal announcements and in the Bulletin Officiel des Annonces Civiles et Commerciales, and registered with the Clerk of the Commercial Court and at the Registry of Commerce and Companies. Auditors are appointed for six fiscal years and their appointments are renewable indefinitely. Further, the auditor, when appointed, is responsible for the accounts of the current fiscal year and is therefore on occasion responsible for accounts prior to his appointment.

#### Dismissal

Shareholders representing 10% of the company's share capital; the workers' council; the public prosecutor; and, in publicly traded companies, the COB may object in court to the appointment of a statutory auditor if they question his competence, integrity, impartiality or independence. The action before the President of the Commercial Court must be filed within 30 days of the appointment date; *i.e.*, the date of the ordinary shareholders meeting. If the court grants the order, the court shall appoint a new statutory auditor who shall remain in office until the appointment of a new statutory auditor by an ordinary shareholders meeting. In the event of fault or impediment, the revocation of the auditor also may be requested from the President of the Commercial Court by the board of directors, shareholders representing 10% of the company's share capital, a shareholders association or the COB in publicly traded companies, the workers' council, or the public prosecutor.

#### Resignation

Auditors may resign, in which case the substitute auditor replaces the permanent auditor. An ordinary shareholders meeting would then nominate a new substitute auditor. Finally, in the event of judicial liquidation of the company, the auditor must present his resignation to the liquidator and inform the judge and public prosecutor thereof.

There are no rules requiring the accountant to disclose any problems regarding the company if the accountant is terminated or resigns. It should be noted, however, that the termination of a statutory auditor is subject to the same publication obligations as his nomination.

## VI. Depositary Receipts/Nominee Rights

Holders of depositary receipts (such as ADRs or GDRs) are not recognized under French law as the holders of the securities underlying the depositary receipt program. In general, issuers of ADRs or GDRs will register themselves or a third-party custodian as owners of the shares. Holders of ADRs and GDRs cannot attend meetings (except as third parties who the SA may in its own discretion invite to attend the shareholders meeting) and cannot vote. In practice, the ADR issuer (or the custodian, if the shares are registered in its name) should vote in its own name at the shareholders meeting by taking into account the instructions from the ADR holders. This may lead the ADR issuer's (or custodian's) representative to express a certain number of votes against and a certain number of votes in favor of a proposed resolution.

## VII. Corporate Governance Code

A corporate governance code has not been adopted yet in France. The Committee on Corporate Governance (which was set up by two organizations representative of French industry) has issued two reports with recommendations in 1995 and 1999.



# Europe

Germany

# Germany



This memorandum was prepared based upon information provided by Heimann, Rechtsanwälte und Steuerberater of Hamburg, Germany and addresses the law and general corporate practices of corporations in Germany. The information is based on the German Stock Corporation Act (“*Aktiengesetz*” or “Act”) and is current as of July 1, 2000.<sup>1</sup>

## I. Rights of Shareholders<sup>2</sup>

### A. Share Ownership

German companies are permitted to issue different classes of shares with different rights to distribution of profits and assets. In general, each share must confer a voting right, but the issuance of non-voting preference shares is permissible. Non-voting preference shares can represent up to half of the share capital of a company.

### B. Voting Rights of Shareholders

Voting rights are determined principally by the Act. Unequal voting rights for shares of the same class are not permissible. The general rule is that one share equals one vote.<sup>3</sup> This can be allocated based on the nominal value of shares or, in the case of non-par value shares, according to the number of shares. The Act permits companies not listed on the stock exchange to limit voting rights so that one share does not necessarily have one vote. Alteration of voting rights is not permissible, except as approved by the shareholders. Cumulative voting is not permissible.

Non-voting preference shares are allowed to vote if (i) the preference dividend is not fully paid in any given year and the shortfall is not paid the following year; (ii) the preferential rights of these shares are cancelled; or (3) new preferential shares will be issued that have priority over existing preferential shares with respect to the distribution of profits or assets. In the case of voting because the preference dividend is not fully paid, the voting right for the non-voting preference shares terminates when the shortfall is paid. The preferential rights of non-voting preference shares can be abolished (thus converting the shares to common stock) if approved by a 75% majority of share capital represented at a general shareholders meeting and by a 75% majority of the votes cast at a separate meeting of the preferential shareholders. Only the managing directors of a company can call a meeting of non-voting shares. There are no quorum requirements for such a meeting.

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1 *A new bill is under consideration in Germany that would update and modernize the Act. The bill principally would provide equal treatment under German law for bearer and registered shares and permit the use of modern technology in the administration of corporate affairs (e.g., use of the Internet in proxy voting and to disseminate information to shareholders).*

2 *Information set forth below is based on the Aktiengesetz.*

3 *Until May 1998, German law permitted shares to have multiple voting rights (i.e., one share could have more than one vote). Although this law has been abolished, a small number of companies have been permitted to phase out the use of multiple voting rights over several years.*

The rights of foreign investors are not subject to any restrictions or limitations that do not apply to domestic investors.

## C. Shareholders Meetings

### 1. Record Date

The concept of record date is not used to determine share ownership and the ability to attend and vote at a shareholders meeting. A person/entity that owns shares on the date of the meeting can attend and vote at the meeting. There are no restrictions on transferring shares prior to a shareholders meeting.

### 2. Notice Requirements for Shareholders Meetings

German companies are required to announce the time, date, and location of all shareholders meetings. The announcement must be made at least one month prior to the date of the meeting and must be published in the Federal Gazette. The announcement must include the entire agenda, and items not appearing in the announcement cannot be voted upon at the meeting. The announcement need only be in German. There may be additional methods of publication required in the corporate articles.

In addition to the published announcement, the company directly must notify certain shareholders within 12 days after the publication of the announcement. In general, the company is required to notify all shareholders that are known to it — this includes certain institutional shareholders (including foreign banks) and shareholder associations; individual shareholders who have requested notification or who have deposited shares with the company; and registered shareholders who voted for themselves at the last shareholders meeting. German credit institutions acting as custodians are required to provide all information received about a shareholders meeting to the shareholders whose shares they hold in custody.

Companies taking affirmative action to qualify their shares for trading outside of Germany are not subject to special notice requirements. In the case of an ADR program, any applicable notice requirements to U.S. ADR holders would be contained in the ADR program documentation, although the German institutional shareholder would receive notice.

### 3. Shareholder Proposals

The Act permits shareholders owning at least 5% of the share capital, or shares of a nominal value of at least 500,000 Euro, who have held the shares for at least three months prior to a meeting, to request an additional item for the agenda. Shareholders meeting this ownership criteria also can request a shareholders meeting. In either case, a formal request for the meeting or additional agenda item must be made in writing to the management board, stating the purpose of, and grounds for, the proposal or meeting. The management board is not obligated to grant the request. If the request is turned down, the shareholders can obtain a court order permitting the meeting or publication of the additional agenda item at the expense of the company. The announcement of an additional agenda item must be



published within ten days after the original announcement of a shareholders meeting. In practice, therefore, most proposals to add an item to the agenda are requested before a shareholders meeting is announced.

Any shareholder has the right to nominate a candidate to the supervisory board of a company, or to propose removal of a member of the supervisory board.<sup>4</sup> In general, the form of share ownership does not affect any of these rights. However, shareholders cannot propose removal of a member of the management board. Shareholders only have indirect control over the management board.

#### 4. Proof of Shareholder Status

The Act does not specify any requirements to be recognized as a shareholder to attend or vote at a shareholders meeting. However, most corporate articles contain these provisions. In some cases, the articles may require physical possession of shares on the day of the meeting in order to be recognized as a shareholder for the purpose of voting. However, German stock corporations generally issue bearer shares, rather than registered shares, and the corporate articles generally provide that the right to attend and vote at a meeting only can be exercised if the shares have been placed in escrow prior to the shareholders meeting. In practice, because most shares are held by banks acting as custodian or nominee, shareholders can obtain certificates of deposit from their banks as proof of their ownership of the shares. The placement of bearer shares in escrow does not limit shareholders' legal ability to sell these shares.

If a company only has issued registered shares, the corporate articles generally will require shareholders to file a notice of their attendance with the company prior to the shareholders meeting. However, since the requirements may differ from company to company, depending on the corporate articles, and as companies are not necessarily aware that they have shareholders in different countries, foreign shareholders may encounter some difficulty in voting their shares, due to the fact that they usually have to deal with layers of nominees.

There is no requirement to hold shares for a certain period of time prior to a shareholders meeting; in general, the only requirement is that the shareholder own the shares on the day of the meeting. Placement of bearer shares into escrow usually is a simple procedure that can be completed in a few days. However, some shareholder rights are limited to persons who have held their shares for a period of at least three months prior to a meeting (see Section I.C.3. above).

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<sup>4</sup> German companies have supervisory boards and management boards. Shareholders elect the members of the supervisory board at the general shareholders meeting. The supervisory board then elects and supervises the management board. The management board manages and runs the company.

## 5. Attendance at Shareholders Meetings

The Act does not restrict attendance at shareholders meetings; every owner of shares, including non-voting preference shares, is entitled to attend every shareholders meeting. Beneficial owners of shares, including ADR holders, also are permitted to attend and vote at meetings.<sup>5</sup>

Attendance at a shareholders meeting may in practice require some proof of ownership, and shareholders may be required to produce the certificate of deposit for bearer shares. Because in Germany shares generally are issued as bearer shares and are held in cumulative custody accounts, the invitations to general and/or special shareholders meetings usually reach shareholders through their banks (as stated above, the company is required to inform banks of upcoming meetings and German banks are required to pass this information on to their customers). Corporate articles generally require that shares be placed in escrow prior to a shareholders meeting, and the banks that are already acting as custodian for shares usually have the right to issue certificates of deposit on behalf of the custodian appointed by the company. This right entitles those banks to give entrance and/or voting cards to their customers. Thus, shareholders usually are able to receive all documents necessary for attendance and voting at shareholders meetings through their bank. The same procedure would apply to foreign shareholders, except that foreign banks may not be required to forward information received from a German company regarding shareholders meetings to their customers. Thus, there is a chance that foreign shareholders may not be able to exercise their rights to attend and vote at shareholders meetings.

Shareholders are permitted to ask questions at a shareholders meeting and also can bring a translator.

## 6. Proxy Voting

Voting by mail is not permitted under German law. Every shareholder is entitled to delegate authority to vote at a meeting to a proxy. In practice, most shares are voted by proxies, especially banks, because shareholders in Germany show little interest in voting their shares. Shares may be voted by any representative to whom voting authority has been delegated in writing. Shareholders can give orders to their proxy on how to vote their shares and the proxy can cover more than one shareholders meeting. However, where proxy authority is delegated to a bank, the proxy authority cannot exceed 15 months.

Foreign investors do not have to be represented by a local attorney or other representative in order to vote at a shareholders meeting. They may without limitation vote by proxy. The proxy document has to be given in writing and should be translated into German.<sup>6</sup> Notarization or authentication is not required. Either the owner or the proxy must attend the meeting to vote. A representative of a legal entity should bring proof of authorization to act as a representative.

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<sup>5</sup> A "beneficial owner" is the owner of a security registered in another's name (such as in the name of a broker).

<sup>6</sup> A bill is under consideration that would modernize the Act and permit the use of the Internet for proxy voting.

Proxy voting is subject to certain limitations, not on the shareholder, but on the proxy, who is required to follow any orders given by the shareholder. Every institutional shareholder, including those that are organized outside of Germany, holding shares as nominee or custodian has to produce a written proxy in order to vote these shares. There are no restrictions on the number of shareholders a proxy may represent, and voting differently on behalf of different shareholders is permitted.

## 7. Quorum

The Act does not require a quorum to conduct business at a shareholders meeting. German companies are permitted to set quorum requirements in their corporate articles; however, in practice these provisions are unusual. Where the corporate articles do require a quorum, they also will set the procedural requirements for determining whether a quorum has been reached, and for reconvening a meeting where the quorum has not been reached.

## 8. Voting and Supermajority Provisions

A shareholder either can vote its shares in person by attending the meeting of shareholders, or by appointing a proxy to attend the meeting. The procedure for voting shares at a shareholders meeting is determined by the corporate articles and may vary significantly. Measures generally can be adopted by a simple majority of the votes cast at a meeting, and the corporate articles can establish a higher percentage requirement, except as specified below. For certain measures specified below, the Act requires a supermajority (75%) of votes or of the share capital represented at a shareholders meeting. Because voting at shareholders meetings only is permitted on items listed on, or properly added to, the agenda, neither shareholders nor management can call for a vote on a new item.

The following resolutions may be passed by a simple majority of the votes cast at a meeting, and the corporate articles are not permitted to set a higher requirement:

- (1) Reduction of compensation of supervisory board members;
- (2) Appointment of special auditors with respect to the management of the company's business; and
- (3) Request for compensation for damage to corporate assets.

The following resolutions require a 75% supermajority of the votes cast at a meeting:

- (1) Removal of a supervisory board member; and
- (2) Approval of a proposal of the management board that has been turned down by the supervisory board.

The following resolutions, among others, require a 75% supermajority of the share capital represented at the shareholders meeting:

- (1) Acquisition;
- (2) Amendments to the corporate articles;
- (3) Transfer of the assets of the corporation;
- (4) Dissolution; and
- (5) Merger.

## 9. Voting Tabulation and Results of Shareholders Meetings

Except for non-voting preference shares, the general rule for listed companies is that one share is equal to one vote, and shareholders or their proxies are required to attend the shareholders meeting to vote. The method for counting votes is governed by the corporate articles and may differ from company to company. If provided by the articles, a simple show of hands may be sufficient (with one vote for each share owned), but in that case the shareholders probably would have the right to demand a formal count. Otherwise, there is no requirement for a tabulation of votes, and shareholders cannot make a request for it.

The minutes of every meeting must be recorded, including the results of votes, and signed by a notary. It should be noted that German notaries differ significantly from the U.S. notary public. Only fully qualified lawyers may be appointed as notaries in Germany. If a company is not listed on the stock exchange, the minutes need only be signed by the chairman of the supervisory board, provided that no resolutions were passed requiring a supermajority. The minutes of shareholders meetings must be filed in the Commercial Register (“*Handelsregister*”), which is open to the public.

## D. Rights of Minority Shareholders in Corporate Transactions<sup>7</sup>

In general, most major corporate transactions have to be approved by a 75% supermajority of the shareholders at a shareholders meeting. There is no mandatory redemption or sale process. Corporate transactions in general are subject to a variety of restrictions and limitations, depending on the type of transaction, for the purpose of protecting the rights of minority shareholders. For example, in the case of a merger or takeover that would affect the value of shares, shareholders of the company to be acquired are entitled to fair and reasonable compensation from the purchaser. A shareholder contesting the fairness of proposed compensation or share price can file a suit in court to determine the appropriate amount of money.

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<sup>7</sup> The rights of minority shareholders in transactions are governed by the Aktiengesetz. Legislation currently is pending to modify this Act.

Managerial acts taken to run the company by the management board that are within the normal course of the company's business are not generally the subject of shareholders meetings. However, shareholders can pass a resolution by a simple majority at the next shareholders meeting that withholds approval of the conduct of the management board for the prior year (similar to a vote of no confidence). Although this vote has no formal legal effect, the management board members generally resign.

A corporation cannot restrict the rights of shareholders under any circumstances.

### **E. Transferability of Shares**

There are no limitations on the ability of a foreign or minority shareholder to sell or transfer shares of a German company.

### **F. Accounting**

Individual shareholders do not have the right to request an accounting. However, the annual statement of accounts must be approved by the shareholders, and a copy of it is available to all shareholders. At the general shareholders meeting, the shareholders can request a special audit with regard to the management of the company's business by a simple majority vote. If this request is not granted, shareholders holding at least 10% of the share capital can file a petition to a German court to require an audit.

In addition, a special audit procedure may apply with regard to misstatements or omissions in the company's financial statements. A group of shareholders representing at least 5% of the share capital or a holding of 500,000 euros can request an audit within one month of the general shareholders meeting in which the financial statements were discussed.

### **G. Inspection Rights**

Shareholders are entitled to any information that is necessary to vote their shares — in general free of charge — but these are not “inspection rights” per se. If information is not provided directly by the company, many documents (such as the minutes of shareholders meetings, financial statements, and the corporate articles) can be reviewed in the Commercial Register. However, shareholders are not entitled to review the minutes of meetings of the supervisory or management boards. In this respect, shareholders are limited to asking questions during the shareholders meeting.

## **II. Payment of Dividends**

In order to distribute dividends, the management board must submit a proposal to the shareholders, who must approve the distribution. The proposal from the management board is discretionary and is subject to the annual financial statement (to which the shareholders also have access). Subject to the corporate articles, the resolution by the shareholders approving the distribution sets the amount to be

distributed and the method. Except for non-voting preference shares, different dividend payments are not permissible; every share is entitled to a sum proportional to the amount of share capital it represents. Cumulative dividends are permitted.

Companies listed on the stock exchange are required to announce the payment, including the amount, of a dividend. This announcement generally is placed in a German newspaper determined by the corporate articles. Because the majority of shares issued in Germany are bearer shares, the shareholder must take steps to claim the declared dividends. In practice, dividends usually are claimed by banks acting as custodians and passed on to the individual shareholder. Corporate articles generally require the payment of dividends in local currency, although payment of dividends in euros is becoming more common.

### III. Affiliated Transactions<sup>8</sup>

Transactions by a company with its affiliates are subject to several restrictions and limitations. Where a parent corporation formally seizes control over an affiliated company by executing a control agreement, the control agreement is subject to the approval of the shareholders of both the parent and the affiliated company. A 75% supermajority of the share capital represented at the shareholders meetings would be required. If approved, the agreement must be published in the Commercial Register. The parent company also is required to compensate the shareholders of the affiliate for any loss of rights and is required to offer to purchase their shares at a reasonable price. Shareholders of the affiliate can contest the agreement and/or the price offered for shares in court within two months after the agreement is published.

In the event a parent corporation holds more than 50% of the shares of an affiliate, but does not execute a control agreement, the parent company is required not to use its influence to cause the affiliated company to act to its disadvantage without adequate compensation. If compensation is not paid to the affiliated company, the parent company is liable to both the affiliated company and its shareholders.

There are no explicit restrictions on dealings between a company and its directors/officers under the Act. However, general provisions of German law may be applicable to transactions by directors/officers that are against the interests of the company.

There are no restrictions on the ownership of shares in a company by its officers, directors, or employees. However, there are rules and regulations with respect to insider trading set out in the German Securities Trade Act. Shares may be sold at less than current market value only to employees who participate in stock option programs; however, even then, the purchase price for those shares must stay within reasonable limits.

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<sup>8</sup> *Transactions with affiliates are governed by the Aktiengesetz and the Securities Trading Act ("Wertpapierhandel").*

## IV. The Role of Local Regulators and Stock Exchanges in Enforcing Shareholder Rights

### A. Responsibility of the Board of Directors

Under the Act, both the management board and the supervisory board are required to represent the interests of the shareholders. The management board also is tasked with a responsibility to represent the company. Directors can and will be held personally liable for breaches of their fiduciary duty.

### B. Enforcement of Rights by Local Regulators

There is no body of law that requires regulators to protect the rights of shareholders; stock corporations are supposed to self-govern their affairs. Thus, there is no regulatory agency that plays an active role in enforcing shareholder rights.

However, certain shareholders are required to make a filing with a government agency. The Securities Trading Act requires shareholders holding more than 5% percent of the share capital of any listed company to notify the Federal Supervisory Board for Securities Trading ("*Bundesaufsichtsamt für den Wertpapierhandel*") and to announce publicly their ownership interest in the Federal Gazette. Failure to do so may result in restrictions on the ability to vote at shareholders meetings, and can subject the holder to a fine of up to 500,000 DM.

### C. Enforcement of Rights through the Judicial System

Under the Act, the ability of an individual shareholder to seek redress for a violation of its rights is somewhat limited. Redress for the violation of shareholder rights generally would be limited to a resolution of the shareholders.

However, under certain circumstances, an individual shareholder may seek redress for the violation of its rights through the judicial system as well. For example, as stated above, if the compensation in the event of a merger/acquisition is not "fair and reasonable," an individual shareholder may file a suit in court within two months from the date the transaction was disclosed to the public. In addition, individual shareholders can file a court suit if a resolution taken at a shareholders meeting is in violation of law or the corporate articles. This type of suit must be filed within one month of the meeting, and the shareholder must have objected to the resolution at the meeting (unless the shareholder was denied access to the meeting or the meeting was not properly convened). In practice, court contests by shareholders often are successful.

Minority or foreign shareholders are treated fairly and equally to domestic shareholders in the judicial system, and they have been able to enforce their rights through the judicial system. There is no requirement that shareholders exhaust remedies with the issuer first. The requirements of the Act make shareholder derivative suits ("*actio pro socio*") very limited, and so they are highly unusual.

## V. Financial Information and Auditors

The preparation and contents of annual and periodic financial reports are governed by the German Commercial Code (“*Handelsgesetzbuch*”). Financial reports have to be prepared at least once a year in time for the general shareholders meeting. Companies listed on the stock exchange are required to prepare at least one more financial report per year. Financial reports are publicly available and can be requested by shareholders; they are not required to be published in foreign languages.

Auditors are subject to mandatory standards and are required to be independent from management. They are elected by the shareholders at the general shareholders meeting for the following business year. Thus, the shareholders may choose to terminate and replace the auditors.

## VI. Depositary Receipts/Nominee Rights

Holders of depositary receipts are recognized as the holders of the security underlying the depositary receipt program. Holders of ADRs can attend shareholders meetings and vote their shares. As noted above, some evidence of ownership generally is required to attend and vote at a shareholders meeting. In practice, the holders of depositary receipts would get an invitation or entrance and/or voting card to a shareholders meeting through the custodian (see Section I.C.4. above). Holders of ADRs can enforce their rights vis-à-vis the company to the same extent as other shareholders.

## VII. Corporate Governance Code

There is a German Corporate Governance Code applicable to stock exchange-listed companies. Compliance with the Code is voluntary. Most provisions of the Code, however, also are contained in the German Stock Corporation Act, and companies therefore are required to comply with those provisions.





# Europe

Italy

Italy

This memorandum was prepared based upon information received from BBLP Pavia e Ansaldo of Rome, Italy. The information contained herein is current as of July 1, 2000.<sup>1</sup>

## I. Rights of Shareholders<sup>2</sup>

### A. Share Ownership

Companies are permitted to issue different classes of stock. As a general principle, shares must attribute the same rights to all shareholders. A company's articles of association may, however, permit the issuance of shares having different rights, such as preferred shares or shares issued to employees. The articles of association may provide for preferred shares to have a preference in the distribution of net profits and proceeds resulting from liquidation and to have voting rights limited to certain resolutions (such as amending the bylaws, providing for the issuance of bonds, and appointing liquidators).

In addition, companies listed on the stock exchange are permitted to issue "savings" shares (*azioni di risparmio*), the rights of which are established by the company's bylaws. Savings shares give shareholders the right to preferential dividends. These shares are the only shares of a company that can be bearer shares (instead of registered shares). Savings shares may not vote in a general shareholders meeting; they can only vote in a separate meeting for savings shareholders.

The aggregate number of all categories of shares having limited voting rights cannot exceed 50% of the share capital of the company.

### B. Voting Rights of Shareholders

Voting rights for ordinary shares are determined by the Italian Civil Code ("Civil Code"). The voting rights for other categories of shares are established by the Civil Code or other laws and by the company's articles of association or bylaws. Shares of the same class of stock may not have different voting rights.

There may be limitations on voting rights of stock of companies in certain sectors, such as banking and insurance, and companies that were previously owned entirely by the State.

Voting rights in general cannot be altered. However, if a category of shares has voting rights set forth in the company's articles of

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<sup>1</sup> *The primary provisions governing corporations in Italy are contained in the Italian Civil Code. The rules set forth herein are applicable only to joint stock companies ("società per azioni or S.p.A.), both listed and unlisted. Limited liability companies ("Società a responsabilità limitata"), which are generally smaller in size, are sometimes subject to different rules contained in the Italian Civil Code.*

<sup>2</sup> *The information in this section is based principally on the Italian Civil Code ("Civil Code").*

association, those voting rights may be altered by amending the articles of association by resolution at a special shareholders meeting.<sup>3</sup> The resolution must be approved by all categories of shareholders whose rights are affected. In addition, the bylaws of a company may provide that certain categories of shares may be converted into ordinary shares, or such a conversion may be approved at a special shareholders meeting. Furthermore, when a company repurchases its own voting shares, the voting rights of such shares are suspended.

If a shareholder owns more than 2% of a listed company, the shareholder must notify the Italian National Securities Exchange (CONSOB) before it can exercise its voting rights. Likewise, where the Italian National Securities Exchange has not been notified regarding voting agreements involving listed companies, voting rights also may be lost.

In certain circumstances, non-voting shares, such as preferred shares and savings shares, may be voted. Preferred shares may be voted in connection with certain special resolutions, and savings shares may be voted at special meetings held especially for those shares. Savings shares generally may vote at a special shareholders meeting only: (i) if the rights of the savings shares will be affected by an action of the company; (ii) with respect to the settlement of a dispute between the savings shareholders and the company; (iii) to appoint or dismiss the representative of the savings shares; and (iv) to create a fund to cover expenses incurred in protecting the rights of savings shareholders and to vote on expenses incurred. The quorum required for a special meeting of savings shareholders called for the purpose of item (i) or (ii) above is 20% of the outstanding savings shares for a meeting held on first, second, or third call. The quorum required for a special meeting of savings shareholders called for the purpose of item (iii) or (iv) above is 20% of the outstanding savings shares for a meeting held on first call, 10% of outstanding savings shares for a meeting held on second call, and no quorum requirements for a meeting held on third call. A special meeting of savings shares can be called by the representative of the savings shareholders or by shareholders of savings shares holding 1% of the company's outstanding shares.

Under Italian law, cumulative voting is permissible and is the norm at shareholders meetings at which directors and statutory auditors are appointed.

The rights of foreign investors to vote their shares are not subject to any restrictions or limitations that do not apply to domestic investors.

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<sup>3</sup> *Italian law distinguishes between general and special meetings. General meetings must be held at least once a year, but there may be more than one general meeting during a year. Special meetings must be called to modify the articles of association, issue bonds, and appoint a liquidator.*

## C. Shareholders Meetings

### 1. Record Date

Record dates are used in Italy to determine share ownership and the capacity to vote shares at a meeting. For unlisted companies, in order to attend and vote at a shareholders meeting, shareholders must be registered in the share register of the company at least five days before the scheduled date of the meeting. Alternatively, shareholders may file their shares at the registered office of the company or a bank prescribed in the notice of meeting at least five days before the scheduled date of the meeting.

For listed companies, in order to attend and vote at a shareholders meeting, shareholders must request from their intermediary (*i.e.*, bank, broker, or other financial institution) a certificate declaring that the shareholder was a shareholder of record five days prior to the meeting.

With respect to unlisted companies, shares that have been deposited with the company or bank in order to participate in a shareholders meeting cannot be returned or freely traded prior to the shareholders meeting. Likewise, with listed companies, once a certificate of ownership has been issued by an intermediary (such as a bank, custodian, or broker), shares cannot be disposed of or traded prior to the meeting.

If a shareholders meeting is adjourned, trading for all shares is not restricted until the adjourned meeting is held.

### 2. Notice Requirements for Shareholders Meetings

The Civil Code requires companies to announce shareholders meetings to shareholders. The notice must give the date, hour, location, and agenda of the meeting. If the proposed agenda items are overly broad, dissenting or absentee shareholders may challenge the proposals at the meeting.

For unlisted companies, notices must be published in the Official Gazette at least 15 days before the scheduled date of the meeting on “first call.” For listed companies, notice must be published in the Official Gazette at least 30 days before the scheduled date of the meeting on “first call” and in a newspaper with national distribution.

If a quorum is not present at the first call of the meeting and the first call notice did not set a date for a meeting on “second call,” in order to call a meeting on second call, a new notice must be published in the Official Gazette within 30 days after the scheduled date of meeting of first call.<sup>4</sup> The notice for second call, under these circumstances, must be published at least eight days, and no longer than 15 days, prior

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<sup>4</sup> The call of a second meeting may be incorporated in the call for the first meeting. It also is common practice that the date for the third call be set out in the first and second call notices.



to the date scheduled for the meeting on second call. Listed companies may call a third meeting if the quorum required for the second meeting is not reached. In these instances, a new notice must be sent within 30 days after the second call meeting.

Irrespective of notice, a shareholders meeting may be held where all the shareholders, directors, and statutory auditors<sup>5</sup> are present. However, only limited items regarding the company's financial statements may be resolved. In addition, any participant may oppose discussion on items on which it is not sufficiently informed.

Shareholders are notified of upcoming meetings by notices published in the Official Gazette and, for listed companies, in a newspaper with national distribution. For many unlisted companies, notice is given personally to each shareholder. Notices are not required to be published in any language other than Italian.

Where a company has taken affirmative actions to qualify its shares for trading outside Italy by establishing American Depositary Receipt or Global Depositary Receipt programs, for example, the custodian receives notice of a meeting from the company. Notice of the meeting may then be given to the depositary receipt holders if required under the terms of the relevant agreement between the depositary and the holders.

### 3. Shareholders Proposals

In principle, Italian law does not contemplate that a shareholder can suggest or require that a proposal be included on the agenda of a shareholders meeting. This does not, however, preclude a shareholder from making a proposal for shareholder consideration through a member of the board of directors.

Notwithstanding the above, shareholders holding at least 20% of the voting share capital of a listed or unlisted company can request that the directors call a shareholders meeting to discuss the topics requested by shareholders. If the directors or statutory auditors fail to respond to the shareholders' request, a meeting will be ordered by a decree of the President of the Court.

In addition, shareholders representing at least 10% of the voting share capital of a listed company (or a lower percentage if so provided in the Articles of Association) may request that directors call a shareholders meeting. The request may be rejected by the directors if it is not deemed to be in the interest of the company. If the request is not rejected, the directors must call the meeting within 30 days from the date of the request. If the directors reject a request to call a shareholders meeting, shareholders have no right to appeal to the directors, but must appeal to the President of the Court, who, after discussion with the directors, may order a meeting.

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<sup>5</sup> *The primary role of the statutory auditors is to watch over the administration of the company. They also may be requested by any shareholder to verify specific issues. In this regard, the Civil Code provides that if the shareholders representing at least 5% of the share capital of non-listed companies request, the statutory auditors must investigate immediately the issues reported and present findings at a shareholders meeting. For listed companies, the law sets a reduced threshold of 2% of the share capital for action by the statutory auditors unless the articles of association provide for a lower percentage.*

There are no specific substantive limits on shareholder proposals. However, generally, proposals must relate to topics within the general purview of a shareholders meeting rather than, for example, the purview of the board of directors.

There is no specific procedure established by law in order for a shareholder to submit a proposal for the meeting agenda. In practice, either a letter to the chairman of the board of directors, or a letter to all the directors and to the auditors, is sufficient to request that an item be placed on the agenda.

In principle, any shareholder may nominate any person as a candidate to the board of directors or to the board of statutory auditors at the general shareholders meeting. There is no notice period required and no formal documentation is necessary, unless otherwise required by company bylaws. Likewise, there are no specific rules for the proposed removal of a director from the board. A call for the removal of a director is handled the same as where a shareholder proposes a nominee for the board.

The form of a shareholder's ownership can affect its right to call a shareholders meeting or place an item on a meeting agenda. Shares that have no voting rights (such as savings shares) have no right to call a general or special shareholders meeting. Likewise, if a company's articles of association provide that holders of preferred shares cannot vote at general shareholders meetings, then holders of preferred shares cannot call general meetings.

#### 4. Proof of Shareholder Status

To be a legally recognized shareholder for purposes of voting shares at a meeting of shareholders, the shareholder must deposit its shares with the company, a bank specified by the company, or an intermediary (e.g., banks, brokers, and other financial institutions). Shares must be deposited five days before the meeting and cannot be returned to the shareholder prior to the meeting.

For unlisted companies, the custodian bank normally must issue an admission ticket before a meeting in order for the shareholder to attend. Case law affirms, however, that the absence of an admission ticket does not preclude the shareholder from voting at the meeting, assuming the shares were deposited with the custodian five days before the meeting.

For listed companies, the intermediary (bank, broker, or financial institution) must issue a certificate stating that the shareholder was a holder of record five days before the meeting.

A representative of a foreign corporate investor should bring evidence to show that the foreign corporation is a shareholder and that the representative has authority to represent the foreign corporation. It is suggested that the documents be translated into Italian.

The form in which shares are held does not affect the ability of the shareholder to vote shares and physical possession of shares is not required in order to vote. For intangible shares held by the Italian Central Securities Depository, the depositors of such shares remain entitled to exercise their corporate rights. Shares can be held by an intermediary, such as a brokerage firm or a custodian. If the shares are held by an intermediary on behalf of the shareholder, the shares remain in the name of the shareholder. An intermediary can attend and vote at a shareholders meeting but only if the intermediary has a proxy authorized by the owner of the shares. If, however, the shares are

held by a fiduciary company (such as a revocable trust), the fiduciary company is registered as the owner and holds the voting rights. The fiduciary company is, nonetheless, obligated to vote according to the instructions of the beneficial owner.<sup>6</sup>

If a custodian holds shares in an omnibus account, the shareholder should still be able to vote by person or by proxy. In an omnibus account, each shareholder generally has his own sub-account.

## 5. Attendance at Shareholders Meetings

In principle only shareholders of record with the right to vote may attend a shareholders meeting and vote. Preferred shareholders, however, may be permitted to attend an ordinary meeting even though they do not have voting rights for such meeting.

A representative of shareholders owning savings shares has the right to attend general and special meetings and challenge resolutions.<sup>7</sup> A company's articles of association may grant greater power to representatives of savings shares.

If shares are held by an intermediary (such as a brokerage firm or bank), the shares remain in the name of the shareholder and the shareholder can vote those shares. If the shares are held by a fiduciary company, the shareholder may not vote the shares held for its benefit; only the fiduciary company or its representative may vote such shares.

As to the documents required to be presented upon attendance at a meeting, a certificate of shareholder status or admission ticket, and a proxy, if any, are necessary. Proxies may be written in any language, although some Italian notaries may request that the proxies be written in Italian.<sup>8</sup>

Shareholders are permitted to ask questions and debate proposals at the meeting. However, special rules may be adopted by a company or established from time to time limiting the number or length of interventions by shareholders. In general, translators are admitted to shareholders meetings.

## 6. Proxy Voting

A shareholder may be present personally or represented by proxy at an annual or special shareholders meeting. A company's Articles of Association may exclude representations by proxy so that all shareholders would have to be personally present at the meeting in order to vote. For listed companies, voting by mail is permitted if certain procedures are met.

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6 A "beneficial owner" is the owner of a security registered in another's name (such as in the name of a broker).

7 Likewise, the Civil Code grants representatives of bondholders the right to attend shareholders meetings and protect bondholder interests.

8 Normally no special form (e.g., notarized form) is required for the proxy.



A proxy form is revocable and may be issued for only one shareholders meeting at a time; a proxy is null and void if the name of the proxyholder is not clearly indicated. Directors, statutory auditors, or personnel of the company and directors, statutory auditors, or personnel of subsidiaries cannot be named as proxy for a shareholder. Proxy forms must be dated and signed and indicate the name of the proxyholder. The proxy may be exercised only for the proposals indicated on the proxy form.

The Civil Code provides that, for unlisted companies, a person cannot represent more than ten shareholders at a shareholders meeting. For listed companies, a person cannot represent more than 50 shareholders if the company's capital is not greater than Lit. 10 billion; more than 100 shareholders if the company's capital is greater than Lit. 10 billion but not greater than Lit. 50 billion; and more than 200 shareholders if the company's capital is greater than Lit. 50 billion. A proxy acting on behalf of more than one shareholder may vote in favor of a proposal on behalf of one client and against that same proposal on behalf of another client.

Shares may be voted by any representative to whom voting authority is delegated except as otherwise discussed above. Entities or persons with conflicts of interest on specific proposals cannot vote shares on those proposals.

A proxyholder cannot "subdelegate" authority to vote at a shareholders meeting to another person. A proxyholder can be replaced only by another person expressly identified in the original proxy. In the absence of such replacement, the proxyholder must attend the meeting himself; he cannot send a form of proxy with any person not identified on the proxy card.

Foreign investors need not be represented by a local attorney or other representative at a shareholders meeting in order to vote; foreign shareholders may vote directly. Foreign investors also may appoint other foreigners or Italian nationals to be proxyholders to vote for them at shareholders meetings.

For listed companies, solicitation<sup>9</sup> of proxies may take place through a *socio committente* (that is, one or more persons that jointly possess shares representing 1% of the voting rights of the company and that have been registered in the shareholders register for six months prior to the meeting).<sup>10</sup> Where the proxies are solicited by the *socio committente*, the proxy form indicates only whether the shareholder supports the proposals supported by the *socio committente*. The form renders it impossible for the shareholder to issue a proxy voting against the proposals supported by the *socio committente*. However, where proxies are gathered by a shareholders association, the Italian National Securities Exchange has indicated that it is more important, in this context, to respect the interests and desires of the individual shareholders. Consequently this form of proxy permits the shareholders to vote against an item on the agenda.

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9 The actual solicitation of proxies is not made directly by the *socio committente* but through an intermediary (a proxy solicitation firm, bank, or management company). There also is a special procedure for shareholder associations to gather proxies.

10 The amount of 1% may be reduced for certain large companies by the Italian National Securities Exchange.

## 7. Quorum

The quorum necessary to hold a valid general meeting is, on first call, at least half of the share capital outstanding. Shares with limited voting rights are not included in the quorum calculation. For general meetings held on second call, the quorum required is either reduced or eliminated. Accordingly, for general meetings on second call, there may be no quorum requirement.

The quorum required for a special meeting is more than half the share capital outstanding, unless the company's articles of association require a higher number. For special meetings on second call, the quorum is reduced to at least one third of the capital, unless the company's articles of association provide for a higher number. Unless the articles of association require a higher percentage, the quorum necessary for a third special meeting is at least 20% of the share capital.

The chairman of the shareholders meeting has the duty to verify whether the quorum requirement has been satisfied.

## 8. Voting and Supermajority Provisions

A shareholder can vote the shares it holds by attendance at the shareholders meeting or execution of a written proxy. For listed companies, voting by mail also is permitted if certain procedures are met.

For both listed and unlisted companies, measures generally can be adopted at a general shareholders meeting on first call by a simple majority of shares voting unless a company's articles of association require a higher voting measure. On second call, a measure generally can be adopted by a majority of the shares voting. (It should be noted that there is no quorum requirement for a general meeting on second call, so the percentage of shares necessary to approve a resolution may be very low.)

For special shareholders meetings, rules differ between listed and unlisted companies. Unlisted company rules require that resolutions be adopted on first call by the affirmative vote of shareholders holding more than one-half of the company's outstanding voting shares, unless the company's articles of association require a higher voting measure. On second call, resolutions may be adopted by the affirmative vote of one-third of the outstanding voting shares, unless the company's articles of association require a higher voting measure. Even on second call, however, the affirmative vote of the shareholders holding at least one-half of the outstanding voting shares is necessary to adopt resolutions concerning a change of corporate purpose, the transformation of the company, the dissolution of the company, moving the registered office abroad or the issuance of preferred shares.

For listed companies, resolutions may be adopted whether on first, second, or third call with the affirmative vote of at least two-thirds of the shareholders present in person or by proxy, unless the company's articles of association require a higher voting measure.

Supermajority requirements may be established for both quorum and voting purposes, with the exception of a general meeting on second call (for which a quorum may not be required.)

## 9. Voting Tabulation and Results of Shareholders Meeting

Shareholder votes typically are counted so that one share is equal to one vote. The Civil Code does not require any specific voting tabulation mechanism. In smaller corporations, typically, shareholders may be requested to raise their hands if they favor a resolution. For listed companies, there is normally a formal counting of votes that is verified by individuals appointed by shareholders.

The chairman of the meeting, together with the secretary of the same meeting, is responsible for counting votes and registering the vote count in the minutes of the meeting. A shareholder, no matter how many shares it has, cannot force a tabulation of votes. At best, a shareholder can request that discussion on an item be closed so that a vote can be held.

There are no requirements under law governing the verification of voting results. A company's articles of association, however, may provide rules regarding the verification of results. In large companies, inspectors are often employed to provide assistance to the chairman and secretary in verifying proxies and voting.

There are requirements to record the results of the meeting. Minutes of general and special meetings must be registered and recorded in a shareholders meeting minutes register. Minutes of special shareholders meetings must be drafted by a notary public who will act as secretary of the meeting. The minutes drafted by the notary are likewise registered in the shareholders meeting minutes register. Shareholders may obtain access to these records.

Under the Civil Code, shareholders have the right to examine the shareholders register and the shareholders meetings minutes register. There is no specific provision contemplating the right of shareholders to examine the results of a vote cast at a shareholders meeting. Shareholders owning savings shares have the right to inspect the voting shareholders meetings minutes register only indirectly, through their representative.<sup>11</sup> Shareholders may generally request extracts of meetings at their own expense. Although there is no direct remedy, if the meeting chairman should fail to comply with a request for extracts of a meeting, a shareholder holding shares representing 10% of the voting share capital may bring an action in court under which the extract must be produced. In certain cases, actions also may be brought against the chairman of the board of directors and statutory auditors.

No information is required to be made directly available to shareholders of unlisted companies after general and special meetings. The only thing required is that the results of the meeting be registered in the shareholders meetings minutes register and available in extract form to shareholders.

For listed companies, the Italian National Securities Exchange has provided various rules that entitle shareholders to be informed both before and after a shareholders meeting of material information, including payment of dividends.

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<sup>11</sup> Generally, savings shareholders will appoint a representative who is not a director of the company. Representatives of savings shareholders typically are persons of authority in the public sector who are highly regarded.

## D. Rights of Minority Shareholders in Corporate Transactions<sup>12</sup>

Shareholders dissenting on a change in corporate type or purpose, the transfer of the registered office abroad, or a merger (if the merger results in a change of corporate purpose) have the right to be cashed out. The amount of reimbursement for shares that are traded is based generally on the average share price over the preceding six-month period. If the shares are not traded, then the amount of reimbursement is proportional to the company's net worth based on the preceding year's balance sheet. The request to be cashed out must be made by registered mail. If the dissenting shareholder attended the relevant shareholders meeting, the request must be made within three days of the date of the meeting; if the dissenting shareholder did not attend the relevant meeting, the request must be made within 15 days from the date the meeting minutes are registered in the company's register. In addition, shareholders whose shares would be changed from listed shares to unlisted shares in connection with a merger or split have the right to withdraw.

In addition, a shareholder's shares may be subject to mandatory redemption when the company is to be dissolved. Share price, in such instances, is determined as described immediately above.

A mandatory sale of shares also may occur where limitations on holdings of cross-shareholding shares are exceeded. Likewise, there are certain obligations to launch a tender offer where certain ownership thresholds for listed companies are reached. Where a shareholder has achieved a shareholding of more than 90%, it must launch a tender offer for the remaining voting shares at a price fixed by the Italian National Securities Exchange. Otherwise, the shareholder must sell enough shares within four months to permit regular trading in the company. In a tender offer, the price is set on equal terms for all shareholders owning the same type and class of shares.

In addition, if a shareholder obtains more than 98% of a company's share capital following a tender offer, such shareholder has the right to acquire any remaining shares within four months from the close of the tender offer so long as the intent to exercise the right had been disclosed in the tender offer materials. Under those circumstances, remaining shareholders would have to sell their shares to the majority shareholder. The purchase price for such shares is set by an expert appointed by the President of the Court and must account for the offer price and the recent market price.

For shareholders of unlisted companies, the tender offer provisions described above would not apply. Transactions for the sale of shares would be subject to direct negotiations, and therefore minority shareholders may receive a lower price than majority shareholders.

There are no other circumstances under which an issuer can restrict the rights of shareholders, including minority shareholders.

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<sup>12</sup> The information in this section is based principally on the Civil Code and the Legislative Decree No. 58 of February 24, 1998 ("Draghi Decree").

## E. Transferability of Shares

There are no specific limitations on the ability of foreign or minority shareholders to sell or transfer shares of an Italian company. However, for unlisted companies, the Articles of Association may provide for a right of first refusal in favor of all other shareholders.

## F. Accounting

Shareholders may not seek an accounting from the issuer; however, the statutory auditors and the independent auditing firm may. The Civil Code provides for the right of shareholders to examine a company's share register and the shareholders meeting minutes register. For listed companies, a more general right to examine all documents filed at the company's registered office is provided. The Civil Code does not specify a procedure for requesting access to these documents; a request to the board of directors or statutory auditor should be sufficient. There are no charges to review these documents and copies may be obtained at the shareholder's expense. If the board fails to comply with a shareholder's request for extracts from the shareholders meeting minutes register, a shareholder holding 10% of the voting share capital of the company may bring an action before a court to order the extract to be produced.

## G. Inspection Rights

Shareholders have the right under the Civil Code to examine a company's share register and shareholders meeting minutes, as described under "Accounting" above.

## II. Payment of Dividends

Annual dividends are declared by resolution of the board of directors as approved at a general shareholders meeting. Interim dividends, which are only for companies whose balance sheets are required by law to be audited, are declared by resolution of the board of directors.

For unlisted companies, dividends are paid directly to shareholders listed in the shareholders register on the record date set for the distribution of dividends. For listed companies, dividends are paid through the depositaries of the shares. Dividends are payable only in lire or euros.

The distribution of dividends is announced for unlisted companies. For listed companies, the Italian National Securities Exchange has various rules that entitle shareholders to be informed both before and after a shareholders meeting whether there will be a dividend payment. An announcement must be published in the news and notice sent to the Italian Stock Exchange. There are no requirements governing the timely receipt of dividend information by shareholders.

Different dividend payments and different dividend payment schedules are not permitted for minority and majority shareholders or domestic and foreign shareholders.

The dividend preferences of savings shares and preferred shares are normally set out in a company's Articles of Association. It is possible that the company's Articles of Association may provide for savings shares or preferred shares to receive past-due dividend payments before common-stock dividends can be paid.

### III. Affiliated Transactions<sup>13</sup>

There are restrictions and limitations on transactions by a company with its affiliates. Directors may not enter into loan agreements in any form with the company, with a controlled company or with a controlling company, and may not obtain guarantees from any of the above for personal debts, unless the lending entity is a bank.

A company may not purchase assets or credits from any director within the first two years of the company's registration for an amount equal or higher than 10% of the company's capital, unless the transaction is authorized by shareholders at a special shareholders meeting. If such a sale is to occur, the selling director must obtain a sworn report, prepared by an expert designated by the President of the Court, containing a valuation of the assets and certifying that the value is not less than the value to be paid by the company.

An unlisted company may not purchase shares of its parent company, unless it is within the limits of its permitted dividends and reserves on the balance sheet. Such a purchase must be authorized by shareholders. The same rule applies to listed companies, which also are obliged to make the purchase through a tender offer or on the market, according to procedures agreed to by the Italian Stock Exchange.

Companies may not raise capital by subscribing to, or by having a controlled company subscribe to, their own shares. Moreover, companies may not raise or increase their capital by cross subscriptions to shares, even through an intermediary or a fiduciary company, and new shares may not be issued for a sum lower than their nominal value. However, a company may repurchase its own shares in the market. The company must obtain shareholder approval to do so at a special shareholders meeting.

There are no restrictions on the ability of an officer, director, or an employee of a company to own more than a certain percentage of stock.

Whether there are any restrictions on a company's selling stock to its officers, directors, or employees at a lower price than the current market price depends on the person involved. Shares may be issued at any price to employees, provided such price is not lower than the par value. Directors and officers of the company are treated as any other third party and therefore the price at which the shares are issued must comply with the general requirements of the Civil Code.

Stock transactions with affiliates must be disclosed to the public or to regulators in certain instances. Each company must include in its report on operations the shares of the company held by directors, auditors, general managers, and other affiliated companies. In addition, if there are more than 200 beneficiaries to the stock option plan, a prospectus must be published.

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<sup>13</sup> The information in this section is based principally on the Civil Code, the Draghi Decree, and requirements of the Italian Stock Exchange.

## IV. The Role of Local Regulators and Stock Exchanges in Enforcing Shareholder Rights

### A. Responsibility of the Board of Directors

There is no body of law that directly requires the board of directors of a company to represent the interests of the shareholders of the company. Under the Civil Code, the board of directors is required to act in the best interest of the company as a whole, including shareholders.

Where ordinary shareholders, savings shareholders, or preferred shareholders are damaged directly by grossly negligent or wilfully harmful acts of directors, shareholders may bring an action for damages. Directors can be, and many times have been, held personally liable for breach of fiduciary duty.

### B. Enforcement of Rights by Local Regulators

Regulatory agencies play an active role in enforcing shareholder rights, although to a less extent than in the United States. Although the sole focus of the Italian National Securities Exchange is not necessarily to protect investors, such protection is part of its general mandate. Likewise, the Bank of Italy, in certain circumstances, issues regulations and has investigative powers to protect shareholders. Furthermore, the Italian Stock Exchange may suspend or revoke securities from trading when necessary to protect investors, although in practice it rarely does so.

The penalties imposed by local regulators for violations of shareholder rights are mainly administrative fines that vary in amount.

Italian law provides for a much less effective and remunerative right of redress by private parties than the laws of the United States. Recourse equivalent to shareholder derivative suits is far less prevalent in Italy than in the United States and the damages awarded, if any, are only a fraction of the damages awarded in the United States. The Italian National Securities Exchange and the Bank of Italy have the primary responsibility of pursuing entities violating shareholder rights, although they pursue violations less vigorously than the U.S. Securities and Exchange Commission and their fines are not very high.

### C. Enforcement of Rights through the Judicial System

The Civil Code provides procedures for the enforcement of the shareholders rights through the judicial system.

There is no requirement that shareholders exhaust remedies with the issuer before seeking redress through the judicial system.

If shareholders suspect serious irregularities in the manner in which the directors are carrying out their actions, a shareholder representing 10% of the capital for unlisted corporations or 5% of the capital for listed corporations may petition a court to open an investigation.

Under the Civil Code, minority and foreign shareholders have the right to bring an action against either the company or the board of directors if damages have been caused to them by unlawful deeds or behavior.

## V. Financial Information and Auditors<sup>14</sup>

The Civil Code provides that both listed and unlisted companies must approve their balance sheets during an annual general meeting. Listed companies also are required to prepare semi-annual financial statements and quarterly financial statements. Listed companies must appoint external auditors to audit the financial statements. The appointment of the external auditors and their duties are governed by law. External auditor independence also is generally required by law.

Annual financial statements are publicly available both for listed and unlisted companies; the form of publication is provided for by law. Reports need only to be published in Italian.

There are rules governing the selection, resignation, and termination of external auditors by a company. External auditors must be chosen from audit firms named on a special register. A general meeting of shareholders may appoint or terminate an external auditor on the recommendation of the internal board of auditors. An appointment shall last for three years and may be renewed twice. When no audit firm is appointed, the Italian National Securities Exchange will appoint one and establish its fees.

If an external auditor resigns or is terminated, it must inform the Italian National Securities Exchange if it formed or may possibly form a negative opinion about a company's balance sheet.

## VI. Depositary Receipts/Nominee Rights

Holders of depositary receipts are not recognized as the holders of the securities underlying the depositary-receipt program because, in a typical depositary-receipt program, the shares are deposited with a custodian bank. The custodian then is the only holder of the underlying shares.

Deposit agreements can, however, give depositary-receipt holders (upon satisfaction of certain conditions) the right to (i) surrender their depositary receipts, withdraw the underlying shares, and become their holders; or (ii) in connection with the exercise of the voting rights pertaining to the underlying shares, have the underlying shares registered for their benefit for a limited period of time after which they are registered once again for the benefit of the custodian. A depositary-receipt holder can be deemed the holder of the underlying shares if such shares are registered for their benefit under applicable provisions of Italian law.

Depositary-receipt holders may attend shareholders meetings only if they qualify as a shareholder as described above. Depositary-receipt holders may vote at shareholders meetings (i) directly as shareholders of the issuer, provided they qualify under the deposit agreement as

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14 Information in this section is based principally on the Civil Code and the Draghi Decree.



described above or (ii) through the depositary, by giving appropriate voting instructions.<sup>15</sup>

Under the terms of a deposit agreement, voting or attendance at shareholders meetings does not necessarily require depositary-receipt holders to withdraw from the depositary receipt program. Deposit agreements contemplate enabling depositary receipt holders to vote at or gain admission to shareholders meetings; depositary receipt holders are required to deposit their depositary receipts in a blocked account with the depositary until completion of the meeting. Upon deposit of the depositary receipts, the depositary has a contractual duty to cause the custodian to have the underlying shares registered in favor of the depositary-receipt holder until completion of the meeting.

Depositary-receipt holders can enforce their contractual rights under the relevant deposit agreement to the extent such agreement is enforceable. Depositary-receipt holders cannot enforce shareholders rights as they are not shareholders of the issuer.

## VII. Corporate Governance Code

The Italian Exchange (*Borsa Italiana*) recently adopted a Code of Conduct for listed companies, which contains a set of “best practice” recommendations. Although the Code of Conduct is not binding, listed companies must report to the *Borsa Italiana* whether or not the company has adopted the provisions of the Code of Conduct and, if not, the extent to which the company’s practices differ from the Code.

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<sup>15</sup> As noted in the relevant section above, in order to attend shareholders meetings, shareholders must have held shares for at least five days before the scheduled meeting date.



Latin  
America

Africa

# Survey of Corporate Governance Practices in Selected Latin American and African Countries

## I. Rights of Shareholders

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
A. Share Ownership:				
<i>Can companies issue classes of stock with different rights?</i>	Yes.	Yes.	Yes.	Yes.
B. Voting Rights of Shareholders:				
<i>a. Can shares have unequal voting rights?</i>	Shares of the same class must have the same voting rights; classes may be issued that are restricted in ownership to Brazilian citizens or convertible into a preferred class. Voting rights are based on the general one share, one vote rule.	Shares of the same class must have the same voting rights; non-voting or limited voting shares are permissible. Voting rights are based on the general one share, one vote rule.	Shares of the same class must have the same voting rights; preferred stock and other classes of stock are permitted to be non-voting. Voting rights are based on the general one share, one vote rule.	Shares of the same class must have the same voting rights; non-voting shares are permissible. Voting rights are based on the general one share, one vote rule.
<i>b. May voting rights be altered, and under what scenarios?</i>	Voting rights may be altered if a corporation begins liquidation proceedings, in which event holders of all shares acquire voting rights (regardless of original rights or shares). See Brazil Tab, Section I.B.	The voting rights for a particular class of shares can be altered by a 2/3 majority resolution of the affected class of shares.	Voting rights may be altered if approved by affected shareholders.	Voting rights of a class of shares may be altered by a special resolution of the affected class of shareholders.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<p><i>c. Are there circumstances under which non-voting shares may be voted?</i></p> <p><i>What are the requirements for calling a meeting of non-voting shares?</i></p>	<p>Preferred non-voting shareholders acquire voting rights in the event the company fails to pay mandatory dividends within a specified period or the rights of those shareholders are affected. The quorum requirement for a meeting is 50% of the shareholders of the affected class. There are no special shareholding requirements for calling a meeting of non-voting shareholders.</p>	<p>Non-voting and limited voting shares have the right to vote when a particular vote directly affects those shares or when preferential dividends for that class of shares are not paid. The right to vote in the latter case would expire when the preferential dividend is paid. A shareholders meeting cannot be called solely for one class of shares; all shareholders may attend all meetings. If a proposal affects the rights of a class, that proposal must be approved by a 2/3 majority of the affected class. If an issuer does not comply with preferential rights of non-voting shares, the holders may call a meeting if their shares represent 10% of the outstanding voting shares.</p>	<p>Non-voting shares may vote at a shareholders meeting where the rights and obligations of that class are at issue. The quorum requirement for a meeting of non-voting shares is 75% of the outstanding shares of a class. If a quorum is not obtained at the first meeting, a quorum of 50% of the outstanding shares of a class must be present for a subsequent meeting. At such a meeting, decisions must be approved by the vote of at least 50% of the shares of the relevant class present at the meeting. There is no minimum ownership percentage required for shareholders to call for a meeting.</p>	<p>Non-voting preference shares have voting rights if the preference dividend is not fully paid or if a resolution is proposed that directly affects the rights or interests of those shareholders, including any proposal to wind down the company or reduce its capital. The quorum requirements for a preference shares class meeting are the same as the requirements for a general shareholders meeting. See block I.C.7 below. There are no shareholding requirements for calling a class meeting.</p>
<p><i>d. Is cumulative voting permissible?</i></p>	<p>Yes. For the election of directors.</p>	<p>Yes. For election of directors.</p>	<p>No.</p>	<p>No.</p>



	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>e. Are the rights of foreign shareholders subject to restrictions that do not apply to domestic investors?</i>	No. Except that the by-laws of unlisted companies may restrict ownership of shares to Brazilian citizens.	No.	No. Except that investment may be restricted in certain strategic industries or areas reserved for Mexican nationals. For companies limited to Mexican nationals, it may be possible to purchase non-voting certificates of participation from a Mexican trustee. See Mexico Tab, Section I.B.	No. Except that there are restrictions on foreign investors in certain industries, including the aviation and broadcasting industries. See South Africa Tab, Section I.B. Shares that are owned by foreign shareholders are endorsed as “non-resident,” but this endorsement does not affect the rights of the shareholder.
C.1. Shareholders Meetings — Record Dates:				
<i>a. Are record dates used to determine rights to vote at a shareholders meeting?</i>	No. The capacity to vote shares is determined based on share ownership (as recorded on the company’s books) on the date of the shareholders meeting.	Yes. Shareholders must be registered with the company five business days before the date of a shareholders meeting to attend and vote at the meeting.	No. Shareholders must evidence their status to be eligible to vote. Evidence of status as a shareholder can be shown by a share certificate and/or the corresponding registration in the company’s share registry. The certificate is issued by Indeval (the securities depository) five to eight days before the meeting.	No. Registration in the company’s books as the owner is required to attend a shareholders meeting. However, companies can elect to close their share register prior to a shareholders meeting.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>b. May shares of a company be freely traded after the record date and prior to a shareholders meeting? If not, what restrictions would apply?</i>	N.A.	Yes. Shares can be freely traded after the record date, and the transferee can be added to the shareholders register. However, neither the transferor nor the transferee will have the right to attend and vote at the meeting. The transferor cannot attend because it is no longer a shareholder, and the transferee cannot attend because it was not registered as a shareholder with the company five days before the meeting.	<p>Yes. Shares may be freely traded before a meeting, except, for public corporations, Indeval (the securities depository) issues share certificates five to eight days before the meeting. After the certificate is issued, shares cannot be transferred until the day after the meeting.</p> <p>A company's bylaws also may require the closing of the share registry for a period of time before the meeting. Therefore, transfers would not be recorded, and a shareholder that transferred shares during that period would still be entitled to vote.</p>	Yes. Where the share register is closed prior to the meeting, shares can still be freely transferred, but the new owner cannot attend or vote at the meeting.
<i>c. If the meeting is adjourned, is trading restricted until the next meeting?</i>	No.	No. But there will be a new record date before the second meeting.	Yes. For public corporations, if the meeting is adjourned for not more than three days at the request of the holders of at least 33% of the shares of a company, trading is restricted until one day after the meeting is held.	No. But a buyer of shares that is not named in the company's register on the day of the next meeting cannot attend or vote at that meeting.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
C.2. Shareholders Meetings — Notice Requirements:				
<i>a. What notice of shareholders meetings is required to be given?</i>	Notice of shareholders meetings must be given by a notice published on at least three occasions in a local newspaper of wide circulation and an official government newspaper. In addition, any shareholder holding more than 5% of the capital stock in a privately held company must be notified by telegram or registered letter, if so requested.	Notice of shareholders meetings must be published either in a local newspaper determined by the shareholders or in the official government gazette. Notice also must be sent by mail to shareholders of open corporations.	Notice must be published in the Official Gazette and/or in a newspaper of the domicile of the company.	Notice of shareholders meetings must be given by advertisement, in person, or by mail to the registered shareholder's registered address.
<i>b. Are there any general or special requirements for giving notice?</i>	Notice must be given eight days in advance of the meeting. If the meeting is adjourned, another notice must be given five days before the new meeting date.	The notice must be published three times. The first notice must be published within 15–20 days before the meeting. In addition, open corporations must mail a notice 15 days in advance to each shareholder and to the regulatory agencies.	Notice must be given (unless otherwise required by the bylaws) at least 15 days before the meeting. For public companies, a copy of the notice must be given to the Mexican Banking and Securities Commission and to the Mexican Stock Exchange.	Notice must be given at least 21 days in advance of an annual general meeting and at least 14 days in advance of other general meetings of the company. A minimum of 21 days notice is required for any meeting where a special resolution is to be passed. Shorter notice provisions can be utilized with the consent of 95% of the shareholders.



	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>c. Must the entire agenda and date and location of the meeting be identified?</i>	Yes.	The agenda is not required to be in the notice, except for special meetings. The notice must contain the date and location of a shareholders meeting.	Yes.	The agenda is not required to be in the notice, except for special resolutions. However, the corporate articles generally require the notice to contain sufficient information on the business to be conducted to enable a shareholder to decide whether or not to attend the meeting.
<i>d. Can an item be added onto the agenda for a shareholders meeting without notice being given to shareholders?</i>	No.	Yes. Except for items on the agenda of a special meeting.	No. Unless all shareholders are represented at the meeting.	No. Case law suggests that where the corporate articles require the nature of the business of a shareholders meeting to be stated in the notice of the meeting, then no business can be transacted at that meeting that was omitted from the notice.
C.3. Shareholders Meetings — Shareholder Proposals:				
<i>a. Can a shareholder submit a proposal for the agenda of a shareholders meeting? What are the procedural or substantive limitations?</i>	Yes. Shareholders representing 5% or more of the outstanding voting corporate capital may request that a proposal be included on the agenda for a shareholders meeting.	Chilean law does not specifically permit or prohibit shareholders from adding proposals at a shareholders meeting.	No.	Yes. Any shareholder can raise an item at a general meeting without prior notice, except for the removal of a director or an auditor.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>b. Can a shareholder call a special meeting of shareholders?</i>	Yes. Shareholders holding 5% or more of the outstanding voting corporate capital may call a special shareholders meeting if they have made a request to the corporate officers and the request has not been satisfied within an eight-day period. Also, any shareholder, regardless of the percentage of shares owned, may call a special meeting under specified circumstances. See Brazil Tab, Section I.C.3.	Yes. Shareholders holding at least 10% of the voting stock can call for an annual or special shareholders meeting to discuss any proposal. These shareholders must first present a written request to the board of directors stating the agenda of the meeting. The board must then issue a resolution convening the meeting and send out notices of the meeting. The meeting must take place within 30 days of the date of the request.	Yes. Shareholders holding 33% of the shares of a company may petition the board of directors or statutory (internal) auditors, in writing, for a meeting to be called. Any shareholder may request that a meeting be called in certain limited circumstances. See Mexico Tab, Section I.C.3.  Any shareholder also may request that the auditors investigate an issue and call a meeting of shareholders if irregularities are found.	Yes. Unless otherwise provided by the corporate articles, two or more shareholders holding at least 10% of the company's share capital can call a general meeting of the shareholders. One hundred shareholders or a group representing at least 5% of the issued share capital of voting shares can ask the management of the company to call a general meeting of the shareholders. If the request is denied, a majority of the requesting shareholders can call the meeting.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>c. Can a shareholder propose to nominate a candidate to the board of directors or remove a director?</i>	Yes. Shareholders having at least 20% of the voting stock are entitled to elect one board member, if the board is composed of fewer than five members. Shareholders holding at least 10% of the voting stock are entitled to request, 48 hours before a general meeting, an election procedure that might result in minority shareholders getting the right to elect members of the board.	Shareholders cannot remove individual board members. At a special shareholders meeting, shareholders can remove the entire board by a majority vote.	Yes. A shareholder may propose to appoint or remove a director if the shareholder owns 10% of the shares of a public company or 25% of the shares of a private company.	Yes. Any shareholder can nominate a director for election to the board. A shareholder can propose the removal of a director from the board, but this proposal must be in the agenda at least 28 days before the meeting. The corporate articles of the company can deviate from these rules.
C.4. Shareholders Meetings – Proof of Shareholder Status:				
<i>a. What are the requirements to be a legally recognized shareholder for the purpose of voting at a shareholders meeting?</i>	A shareholder must show ownership on the day of the shareholders meeting and provide proof of identity. In addition, owners of shares held by a custodian must show a certificate proving that a depository institution holds the shares. Owners of bearer shares must provide a certificate or receipt of deposit.	A shareholder must be registered in the shareholders register five days before a meeting.	A shareholder must show ownership, which can be done by showing a certificate issued by Indeval (the securities depository) and/or being listed in the company's share registry. For public corporations, all shares are deposited with Indeval by securities brokers on behalf of their clients.	A shareholder must be registered in the company's share register on the date the register is closed. To attend the meeting, the shareholder must bring some proof of identity.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>b. Often shares are held in the name of a nominee (such as a custodian or broker) although owned by another person (the beneficial owner). Can shares be held in the name of a nominee, yet still be voted by the beneficial owner?</i>	Yes. The beneficial owner must present the share certificate showing the shareholder as the beneficial owner of the shares.	No. Unless the beneficial owner acts as a proxy of the registered owner.	Yes. For public companies, the beneficial owner can vote if it presents a certificate issued by Indeval (the securities depository) and a list from its broker identifying the clients for whom the broker holds shares.	No. Unless the beneficial owner acts as a proxy of the registered owner.
<i>c. If shares are held in the name of a custodian or other nominee, could the custodian vote some shares in favor of a proposal for one beneficial owner and other shares against the same proposal for another beneficial owner?</i>	No. Unless the custodian or other nominee is acting as proxy for several beneficial owners.	Yes. A custodian or other nominee can cast votes in opposing directions, provided that the nominee discloses that it is voting on behalf of more than one beneficial owner.	Yes.	Yes.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
C.5. Shareholders Meetings — Attendance at Shareholders Meetings:				
<i>a. Can a shareholder (of record or beneficial) attend annual or special meetings? What restrictions apply?</i>	There are no restrictions on attendance by beneficial shareholders. A record owner may attend a shareholders meeting and vote shares only if he presents a power of attorney executed by the beneficial owner granting the record owner powers for such purposes.	Only a listed owner of shares (voting or non-voting) on the company's register five days prior to a shareholders meeting can attend that meeting.	The record owner may attend a meeting directly or designate an attorney-in-fact or proxy. A beneficial owner may attend a meeting if the record owner issues a proxy in the beneficial owner's name. For public companies, a beneficial owner does not need a proxy to attend a meeting. See Mexico Tab, Section I.C.5.	Only shareholders registered in the company share register on the date the register is closed can attend and vote at meetings.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>b. What documents are required to attend the meeting?</i>	Shareholders must provide proof of identity and a certificate proving shares are held by the company or a depository institution. See Brazil Tab, Section I.C.5. Proxy holders should provide evidence of the delegation of proxy. See Block C.6.d. Representatives of corporate shareholders also must provide evidence of proof of identity and proof of authorization to act as a representative of the company. All documentation must be consularized, notarized, and translated into Portuguese by a sworn translator.	The registered shareholder must bring identification to the meeting. Representatives of corporate shareholders must bring documentation proving the representative's status as an officer acting on behalf of the corporate shareholder. Any proxy of the shareholder attending the meeting would have to bring a written proxy.	For public companies, a shareholder must present a certificate from Indeval (the securities depository) and a list of beneficial owners from the securities broker.  For private companies, the shareholder must be listed in the share registry and/or must present a share certificate or evidence of deposit with a financial institution in Mexico or abroad at the meeting. Proxy holders should provide evidence of the delegation of proxy. See Block C.6.d. Representatives of a corporate shareholder must bring a proxy letter which, unless otherwise established in the company's bylaws, must be in writing and executed by the authorized representative of the corporate shareholder before two witnesses. The proxy letter must be written or translated into Spanish. A corporate shareholder also may grant a general power of attorney to vote at all meetings. See Mexico Tab, Section I.C.6.	Proof of identity is generally required.  Representatives of corporate shareholders must bring evidence of a corporate resolution authorizing the representative to act on behalf of the company.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<p><i>c. May a shareholder ask questions at the meeting?</i></p> <p><i>May a shareholder bring a translator to the meeting?</i></p>	<p>Shareholders may ask questions at the meeting.</p> <p>A shareholder only can be accompanied, generally, by another shareholder or a lawyer. Therefore, a translator, acting only as such, may not be permitted to attend the meeting.</p>	<p>Yes. Shareholders may ask questions at meetings and bring a translator.</p>	<p>Shareholders may ask questions, but the company is not required to answer them if they are not related to issues on the agenda.</p> <p>Shareholders owning more than 33% of the shares of a company may present a motion to suspend a meeting for up to three days if they do not have information required to vote their shares.</p> <p>There is no prohibition on bringing a translator to a meeting.</p>	<p>Yes. Shareholders may ask questions at meetings.</p> <p>Shareholders do not have the right to bring a translator to the meeting.</p>

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
C.6. Shareholders Meetings — Proxy Voting:				
<i>a. Can shareholders vote by form of proxy at a shareholders meeting? What are the restrictions or requirements?</i>	Voting by mail is permitted.	Voting by mail is not permitted; the shareholder or its proxy must attend the meeting. A shareholder can appoint an individual officer of the company as proxy.	Voting by mail is not permitted; the shareholder or its proxy must attend the meeting.	The corporate articles can provide for voting by mail, but this is unusual. A shareholder can appoint the chairman of the meeting as proxy and instruct him how to vote. Unless the corporate articles permit otherwise, a proxy only can vote in a “poll” vote and not by show of hands.
<i>b. May shareholders delegate authority to another person to act as proxy?</i>	Yes. A shareholder may delegate voting authority to another shareholder, a management representative of the company, or a lawyer.	Yes. Shareholders may delegate voting authority to any representative.	Yes. A shareholder may delegate voting authority to any representative; however, directors and statutory auditors may not be designated as proxies.	Yes. Shareholders may delegate voting authority to any representative.
<i>c. May delegates of a shareholder vote in person or by proxy?</i>	Delegates of a shareholder may vote by attending a meeting in person or by mailing in the proxy, depending on the requirements of a particular proxy.	The shareholder’s proxy must attend the meeting and vote in person.	The shareholder’s proxy must attend the meeting and vote in person.	The shareholder’s proxy must attend the meeting and vote in person.



	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>d. What are the general requirements for delegating voting authority to a person to act as proxy?</i>	The power of attorney granted by a foreign investor to a proxy must be consularized and notarized in the country of origin of the foreign investor, sworn, translated, registered with the registry of title and deeds, and filed with the company in order for the votes to be counted at the meeting.	The proxy must be in writing in Spanish and duly consularized. The form of proxy can be a private instrument or a public deed. Proxies also must contain certain declarations required under Chilean law.	Unless a company's bylaws provide otherwise, all designations of proxy must be evidenced in a written document signed by the shareholder before two witnesses. A shareholder also may grant power of attorney to its representatives before a notary public.	Requirements for the form of a proxy are governed by the corporate articles. The corporate articles may require the proxy document to be filed with the company prior to the meeting.
<i>e. What general limitations exist for a person who is acting as a proxy? Can a proxy vote in favor of a proposal for one shareholder and against the same proposal for another shareholder?</i>	No general limitation. A proxy (including a bank, custodian, or other nominee serving as proxy) may vote on behalf of more than one shareholder and may vote in favor of a proposal for one shareholder and against the same proposal for another shareholder.	Proxies are not permitted to divide the votes of a shareholder, except for the appointment of board members. A proxy (including a bank, custodian, or other nominee serving as proxy) may vote on behalf of more than one shareholder and may vote in favor of a proposal for one shareholder and against the same proposal for another shareholder.	No general limitation. A proxy (including a bank, custodian, or other nominee serving as proxy) may vote on behalf of more than one shareholder and may vote in favor of a proposal for one shareholder and against the same proposal for another shareholder.	A proxy must follow the instructions of the shareholder. A proxy (including a bank, custodian, or other nominee serving as proxy) may vote on behalf of more than one shareholder and may vote in favor of a proposal for one shareholder and against the same proposal for another shareholder.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
C.7. Shareholders Meetings – Quorum:				
<i>What are the requirements for determining if a quorum has been obtained?</i>	A quorum for a meeting ranges from 1/4 to 2/3 of the outstanding voting corporate capital depending on various factors. See Brazil Tab, Section I.C.7.	A quorum to convene a shareholders meeting is generally a simple majority of the issued voting stock. The quorum is determined by counting proxies and the signatures on a list of attendance.	A quorum for an ordinary meeting is 50% of the shares of a company. For an extraordinary or special meeting, the quorum requirement is 75% of the shares of a company.  There is no quorum requirement for an ordinary meeting that is reconvened because of failure to obtain a quorum. For a reconvened extraordinary or special meeting, the quorum requirement is 50% of the shares of a company. See Mexico Tab, Section I.C.7.	Except for a special resolution, a quorum is three shareholders. For a special resolution, the quorum is 25% of the total votes of all shareholders entitled to vote at a meeting. The corporate articles can require a larger number. The quorum generally is determined by a head count.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
C.8. Shareholders Meetings – Voting and Supermajority Provisions:				
<i>a. How does a shareholder vote shares?</i>	A shareholder can vote its shares in person, by sending in a form of proxy via mail, or by delegating voting authority to another person who attends the meeting in person.	A shareholder, or its proxy, must attend a meeting and vote in person.	A shareholder, or its proxy, must attend a meeting and vote in person.	A shareholder, or its proxy, must attend a meeting and vote in person. It is common to appoint the chairman of the meeting as proxy. Where the method of voting is by show of hands, each shareholder only has one vote regardless of the number of shares owned.
<i>b. What are the general requirements for voting for a measure to be adopted?</i>	For unlisted companies, measures proposed at a shareholders meeting generally can be adopted by a simple majority of shares voting. Listed companies may have different requirements. See Brazil Tab, Section I.C.8.	Most measures can be adopted by a simple majority of the voting shareholders at a meeting.	Most measures can be adopted by a simple majority of voting shares present at an ordinary meeting. For extraordinary and special meetings, resolutions require a vote of at least 50% of the shares of a company to be adopted.	Most measures can be adopted by a simple majority of those voting at a shareholders meeting. However, a special resolution for certain matters requires a higher vote.
<i>c. Can a company adopt higher (supermajority) voting measures?</i>	Yes. The corporate articles of a non-listed company may require a supermajority vote for certain proposals.	Yes. The corporate articles can provide for greater voting/quorum requirements.	Yes.	Yes. The corporate articles can provide for a supermajority voting requirement.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>d. Are supermajority voting requirements required by law?</i>	No.	A 2/3 majority of the issued stock of a company is required to pass certain resolutions, including: merger or spin-off, dissolution, reduction of corporate capital, transfer of assets or liabilities, or non-cash distributions of stock. See Chile Tab, Section I.C.8.	Yes. Certain measures voted on at extraordinary meetings are required by law to be approved by a supermajority.	Yes. For passage of a special resolution, at least 75% of the shareholders must approve it. In a “poll” vote, the measure must pass by at least 75% of the total votes to which the shareholders at the meeting are entitled. Matters requiring the special majority include alteration of the corporate articles and alteration of the objects and powers of the company.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
C.9. Shareholders Meetings – Voting Tabulations and Results of Shareholders Meetings:				
<i>a. What general mechanisms apply in counting votes?</i>	There is no formal proceeding pre-established by law. In practice, the chairman of the meeting checks the attendance book and manually counts the number of votes.	The procedure for counting votes is by voice count, with the president and secretary of the meeting recording the votes. The president and secretary may instead elect to count votes by written voting card. The president announces each vote so that shareholders in attendance can calculate and verify the accuracy of the results. Then the secretary adds the votes, and the president announces the final results.	Usually, votes are counted by a show of hands at the meeting, although a company's bylaws can require other methods of voting.	Where the method of voting is by show of hands, each shareholder has only one vote regardless of the number of shares owned. In "poll" voting, any shareholder or proxy can exercise all of his voting rights, but is not obligated to vote or cast all of the eligible votes.
<i>b. Is management of a company required to tabulate the votes?</i>	Yes.	Yes.	No.	No. This is not required, but the corporate articles may provide for it.
<i>c. May foreign investors call for a tabulation? What limitations apply?</i>	Yes. Any shareholder may propose a motion to call for a tabulation.	Yes. Registered shareholders can require a company to announce votes as described in Block C.9.a. above.	Yes. Any shareholder may propose a motion to call for a tabulation. The motion must be approved by a majority of shareholders present at the meeting.	No. Unless the corporate articles provide for it.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>d. What are the requirements regarding the verification of votes of a shareholders meeting?</i>	Brazilian law does not provide for an inspector of elections. Verification of the vote is attributed solely to the president of the shareholders meeting. If a shareholder requests verification, it has to be approved by the simple majority of shareholders attending the meeting (or by a higher vote, if required by the corporate articles).	Three shareholders must sign and approve the minutes of the meeting. These three shareholders, the president, and the secretary are required to verify the election process and the results of the vote.	A teller is appointed to prepare an attendance list and count the votes cast. The attendance list is signed by the shareholders or proxies attending the meeting.	There are no requirements for verification of votes.
<i>e. What information is made available to shareholders regarding the results of a shareholders meeting?</i>	Minutes of all shareholder meetings must be prepared, filed with the competent Board of Commerce and, in the case of listed companies, must be published in at least two newspapers as well.	Minutes of meetings must be recorded and must include attendance, the number of shares represented, summary of discussions, summary of proposals, voting results, and a list of the shareholders who dissented. Any shareholder can request a copy of the minutes.	Minutes must be prepared and approved before the meeting is adjourned. Shareholders have the right to request access to the minutes of a meeting. For public corporations, a copy of the minutes is delivered to the Mexican Stock Exchange and the Mexican Banking and Securities Commission and is published by the Mexican Stock Exchange.	Minutes of meetings, with vote results, must be recorded in an official minute book. The minutes must be entered within one month of the date of the shareholders meeting. All shareholders are entitled to inspect the minutes and be provided with copies of the minutes.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
D. Rights of Minority Shareholders in Corporate Transactions:				
<i>a. What rights does a minority shareholder have in a corporate transaction (such as a merger, takeover, privatization, etc.)?</i>	With respect to certain transactions (mergers, acquisitions, spin-offs, and liquidation), shareholders with voting rights are entitled to vote. If the results of a shareholder vote is contrary to the minority shareholder's wishes, it may be entitled to dissenter's rights. See Brazil Tab, Section I.D.	For certain major corporate transactions, a 2/3 majority of the issued shares is required to approve the transaction. Minority shareholders have dissenters' rights. Shareholders that dissent in writing have the right to force the corporation to purchase their shares. See Chile Tab, Section I.D.	Shareholders that vote against a proposal to spin-off or transform the company have the right to withdraw from the company and receive the book value of the shares.  Shareholders representing 33% of the shares of a company may oppose in court resolutions approved at a meeting under certain circumstances.	All shareholders have access to the courts if a company takes action that is unfairly prejudicial, unjust, or inequitable. In a takeover or merger situation, an equal offer must be made to all shareholders if the purchaser attempts to acquire 35% or more of a company. Where a purchaser acquires 90% of all the shares, or a particular class of shares, the remaining 10% shareholders can force the purchaser to buy their shares.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>b. Can shares be subject to mandatory redemption or sale? How is the share price determined?</i>	Yes. A company's corporate articles may provide for mandatory redemption or sale of shares. There are no rules stating how share price is determined; it is likely that book value would be applicable.	No.	No. Shares generally are not subject to mandatory redemption or sale unless, at an extraordinary meeting, shareholders holding 50% of the shares of a company approve a capital reduction by redeeming shares. Shares to be redeemed are selected by lottery and paid at book value.	No. Except in rare situations under court order, such as during a reorganization. In that case, a special resolution can be passed by 75% of the shareholders approving the company's purchase of 100% of its shares.
<i>c. How can a minority shareholder object to actions taken by majority shareholders in a corporate transaction?</i>	A shareholder may not object to actions taken by a majority shareholder or management in a corporate transaction where the actions are taken without an abuse of power or breach of managerial duties. See Brazil Tab, Section I.D.	Dissenting votes and comments of shareholders are recorded in the minutes. Additional protection for minority shareholders currently is proposed in a new bill before the Chilean Congress. See Chile Tab, Annex A. Also, minority shareholders can institute arbitration or court proceedings. See Chile Tab, Section I.D.	Shareholders that vote against a proposal to spin-off or transform a company have the right to withdraw from the company and receive the book value of their shares. See Mexico Tab, Section I.D.	Dissenting votes and comments are recorded in the minutes, and minority shareholders can petition the courts for unjust actions of a company. Shareholders also can lodge complaints with the Securities Regulation Panel. See South Africa Tab, Section I.D.



	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>d. Under what circumstances can an issuer restrict the rights of shareholders?</i>	None, except where a class is issued with restricted rights.	None, except where a class is issued with restricted rights.	None, except where a class is issued with restricted rights.	None, except where a class is issued with restricted rights.
E. Transferability of Shares:				
<i>Are there any limitations on the ability of a minority or foreign shareholder to sell or transfer shares?</i>	No. There are no such specific limitations, although the ability to sell or transfer company shares may be restricted by a shareholder agreement. See Brazil Tab, Section I.E.	No. Corporations cannot restrict the transfer of securities.	No. There are no such specific limitations, although the bylaws of a private company may impose restrictions on transferability, such as requiring prior approval of the board. Shareholders may assume, under contract, certain limitations on transferability.	No. Corporations cannot restrict the transfer of securities. However, foreign investors only can remit the proceeds of a sale of shares outside South Africa if the share certificates are endorsed “non-resident.”
F. Accounting:				
<i>Under what circumstances can a shareholder seek an accounting of the issuer?</i>	A shareholder has no right to demand an accounting.	Shareholders do not have an individual right to obtain access to the books and records of an issuer. Shareholders have a right to appoint by a majority vote “account inspectors,” which can be shareholders. They have the authority to review the books and records of the company.	Shareholders owning at least 10% of a public company’s shares or 25% of a private company’s shares can designate a statutory auditor and, therefore, have access to the books and records of the company.	A shareholder has no right to demand an accounting or to inspect company records.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
G. Inspection Rights:				
<i>Do shareholders have inspection rights (such as to review a company's share register, minutes of meetings, financial statements and other documents)?</i>	Yes. Shareholders have inspection rights. In addition, minutes of shareholders and board of directors meetings, financial statements, and by-laws are public and must be published in newspapers.	Shareholders can access at any time a list of shareholders and the company's articles at the company's offices. In addition, for 15 days prior to the annual shareholders meeting, shareholders have the right to inspect the annual report, balance sheet, inventory, minutes, and auditors' and account inspectors' reports. Any shareholder can request a copy of the annual report.	Yes. Shareholders must be given access to inspect the company's share registry and the minutes of shareholders meetings.  In certain limited circumstances, shareholders may be given access to the minutes of the board of directors meetings, audited financial statements, and the corporate articles.	Shareholders have access to a limited range of company documents. The corporate articles and other corporate documents must be filed in the public register of companies and are available for public inspection. Minutes of meetings also are available to the shareholders at their request. A shareholder also can inspect the share register and a listing of directors' interests in the company.

## II. Payments of Dividends

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>a. Do companies publicly announce the payment of a dividend?</i>	Yes.	Yes. Companies must declare the payment of dividends either in a local newspaper or in the official government gazette. The notice must be published within 20 days before the payment of the dividend.	Yes. Public companies must announce the payment of a dividend (including amount and date of payment) in a newspaper. The announcement also is sent to the Mexican Stock Exchange, the Mexican Banking and Securities Commission, and Indeval (the securities depository). For private corporations, notice is sent to shareholders by mail.	Yes. Listed companies must publicly declare a dividend. After declaring the dividend, a company will generally close its register to new shareholders; there must be at least two weeks between the declaration and the closure. The company is required to give notice of its intention to close the register to new shareholders.
<i>b. Are dividend distributions mandatory or discretionary?</i>	Generally, all shareholders are entitled to a mandatory dividend each fiscal year. See Brazil Tab, Section II.	Dividend distributions are discretionary except for open corporations. Dividends are declared by the annual shareholders meeting by majority vote. The board can distribute interim dividends out of profits at other times of the year. Chilean law requires that open corporations distribute a certain annual cash dividend, unless otherwise decided by the unanimous vote of the shareholders. See Chile Tab, Section II.	Dividend distributions are discretionary.	Dividend distributions are discretionary. The declaration of dividends is passed by the shareholders in their general meeting. The directors generally have the power to recommend the dividend amount. The exact method of declaring dividends is set out in the corporate articles.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>c. Are different dividend payments permitted for foreign and domestic shareholders or majority and minority shareholders?</i>	No.	No.	No.	No.
<i>d. Are cumulative dividends permitted (where preferred stock gets past-due dividends before common-stock dividends get paid)?</i>	Yes. Cumulative dividends are permitted in accordance with the cumulative distribution prescribed in the corporate articles.	Yes.	Yes. Certain classes of shares may be entitled to collect past-due dividends before common-stock dividends can be paid.	Yes.
<i>e. Are dividends payable only in local currency?</i>	Yes. In the case of foreign shareholders whose investments are registered with the Central Bank of Brazil, the company may convert the dividends into a foreign currency for remittance abroad.	Yes. Unless shareholders elect certain distributions to be in stock. See Chile Tab, Section II.	Yes.	Yes.

### III. Affiliated Transactions

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>a. Are there restrictions on transactions by a company with its affiliates, including employees?</i>	Yes. See Brazil Tab, Section III.	Transactions with related parties must be approved by the board of directors, which must be disclosed to the shareholders at the upcoming meeting, and must be at “arm’s length.”	There are no restrictions on transactions with affiliates, but a director or shareholder cannot participate in a business transaction if they have a conflict of interest.	There are no specific restrictions on transactions with affiliates. Certain payments to directors and other affiliated party transactions require shareholder approval. See South Africa Tab, Section III.
<i>b. Are there restrictions on an officer or director owning more than a certain percentage of stock?</i>	No. But an officer or director has an obligation to disclose the percentage of securities owned.	No. With minor exceptions.	No. With the exception of certain highly regulated sectors such as banks or securities brokerage firms.	No. But there are disclosure requirements when a company issues shares to employees or directors. There also are rules prohibiting insider trading.
<i>c. Can a company sell stock to officers, directors, or employees at a price lower than the current market price?</i>	Yes.	No. This is a related party transaction and must be made at market price.	In practice, shares may be sold to officers, directors, or employees below market price. Nonetheless, under law there is a general prohibition against a company placing or offering its shares below par value.	Yes.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>d. Are transactions with affiliates required to be disclosed to the public or regulators?</i>	Yes. Conflicts of interest must be disclosed to the board of directors or administrative counsel and included in the minutes of such meeting. Those minutes are publicly available.	Yes. Acquisition of stock by an officer or director must be disclosed to the stock exchange and the regulatory authority. Related party transactions must be disclosed to the shareholders meeting.	No.	Yes. For certain loans and for shares issued to directors. See South Africa Tab, Section III. Interests of directors in contracts with the company are disclosed in a register that is available to the shareholders.

## IV. Enforcement of Shareholder Rights

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
A. Responsibility of the Board of Directors:				
<i>a. Is there a body of law that requires the board of directors to represent the interests of the shareholders of the company?</i>	No. Directors have a duty only to the company, although the directors could be deemed to have an indirect duty to shareholders.	Yes.	Yes.	No. Directors have a duty only towards the company. Under South African law, directors do not have a direct or indirect duty to shareholders.
<i>b. Can directors be held liable for breach of fiduciary duty?</i>	Yes.	Yes.	Yes.	Yes.
B. Enforcement of Rights by Local Regulators:				
<i>a. Is there a regulatory agency or stock exchange in the country that oversees shareholder rights?</i>	In privatization cases and restructuring transactions, the Brazilian Securities and Exchange Commission increasingly has played an active role in enforcing shareholders' rights. The local stock exchange does not directly oversee shareholder's rights.	Yes. The Chilean Superintendent of Securities and Insurance has the authority to regulate open companies and provide protection to minority shareholders.	Yes. The Mexican Securities Market Law provides that regulators have the obligation to protect shareholder rights in public corporations. The Mexican Banking and Securities Commission is the agency responsible for the enforcement of such rights.	No. But government agencies do have the power to investigate misconduct by listed companies. In addition, with regard to takeovers and mergers, shareholders may file a complaint with the Securities Regulation Panel.

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>b. In practice, does the regulatory agency or stock exchange play an active role in enforcing rights?</i>	Yes. The Brazilian Securities and Exchange Commission is becoming more active in enforcing shareholder rights.	Yes.	Yes. The Mexican Banking and Securities Commission and the Mexican Stock Exchange play an active role in enforcing shareholder rights.	No.
C. Enforcement of Rights through the Judicial System:				
<i>a. What legal measures are available to shareholders if they believe their rights have been violated?</i>	Shareholders that believe their rights have been violated can, under specific circumstances, initiate a suit and seek damages caused by a controlling shareholder failing to perform its duties. Such a suit would be against the controlling shareholder. See Brazil Tab, Section IV.C.	Chilean law requires corporations to have arbitration proceedings for shareholder disputes, but they do not have to be mandatory. Shareholders are permitted to file court suits against companies for violating Chilean law, or against board members for fraudulent or negligent actions. Shareholders also can file complaints with the Superintendent of Securities and Insurance.	Shareholders holding at least 33% of the shares of a company may file a claim in court opposing adopted resolutions that breach the law or the by-laws and may seek directly civil damages against directors under certain circumstances. Any shareholder also may file a claim in court if its rights to vote, attend a meeting, or receive dividends or liquidation quotas or other distribution are breached.	Any shareholder may file a lawsuit if a company engages in an unjust or inequitable action. Shareholders also can file a complaint with the Securities Regulation Panel for a complaint related to a takeover or merger.
<i>b. Must shareholders exhaust remedies with the company first?</i>	No.	No.	No.	No.



	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>c. Can a minority or foreign shareholder bring a "derivative suit" against a company?</i>	Yes.	No. Not currently, but a proposal is now before the Chilean Congress.	No.	Yes. A shareholder can bring a derivative suit where the company has suffered damages or has been deprived of a benefit, if the company has not instituted proceedings itself.

## V. Financial Information and Auditors

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>a. Are there laws and regulations governing the preparation of financial reports?</i>	Yes. See Brazil Tab, Section V.	Yes. See Chile Tab, Section V.	Yes. See Mexico Tab, Section V.	Yes. See South Africa Tab, Section V.
<i>b. Are such reports publicly available?</i>	Yes.	Yes. Corporations must hold the annual report, audited financial statements, balance sheet, inventory, minutes, and reports at the corporation's offices for shareholder viewing for 15 days prior to the annual shareholders meeting.	Yes.	Yes.
<i>c. Can a shareholder request such reports?</i>	Yes.	Yes. The annual report and financial statements are automatically sent to certain shareholders; all other shareholders can request a copy of the annual report.	Yes.	Yes.
<i>d. Are the reports available on a timely basis?</i>	Yes.	Yes. They are available for viewing 15 days prior to the annual shareholders meeting.	Yes.	Yes. A copy of the annual financial statements must be sent to the shareholders at least 21 days before the day of the shareholder meeting at which the financial statements will be considered.

<p><i>e. Are there rules imposing standards on auditors?</i></p>	<p>Yes. Only accounting firms and independent auditors duly registered with the Brazilian Securities and Exchange Commission may audit financial statements of listed companies. The independence of auditors from management is a preliminary requirement in order to be registered with the Brazilian Securities and Exchange Commission.</p>	<p>Yes. Independent auditors and account inspectors must supervise company operations to ensure compliance with the law. Auditors must be registered with the Superintendent of Securities and Insurance and comply with its rules. Records must comply with Chilean GAAP.</p>	<p>Yes. Regulations require independence from management, and there are strict rules on the preparation of financial statements.</p>	<p>Yes. Auditors must maintain their independence. The auditors are appointed by the shareholders at each annual general meeting.</p> <p>Accounting methods must comply with South African GAAP.</p>
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## VI. Depositary Receipts/Nominee Rights

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>a. Are holders of ADRs or GDRs recognized as the holders of the securities underlying the depositary-receipt program?</i>	No. The custodian, on behalf of the depositary, is recognized as the holder of the securities underlying the depositary-receipt program. See Brazil Tab, Section VI.	No.	No.	No.
<i>b. Are ADR holders permitted to vote at a shareholders meeting? What requirements apply?</i>	No. The ADR or GDR holders may attend shareholders meetings and must give instructions to the depositary/custodian to vote on their behalf.	No. Unless the custodian appoints the holder as a proxy.	No. Unless the depositary appoints the ADR holder as a proxy or the ADR holder exchanges the ADRs for the underlying shares and becomes the shareholder of record.	No. Unless the custodian appoints the holder as a proxy.
<i>c. Can the holders of ADRs enforce their rights against the company, or must they seek redress through the entity that put the ADR program together?</i>	No. Holders of ADRs have no rights against the company; they must enforce rights against the entity that put the ADR program together.	No. Holders of ADRs have no rights against the company; they must enforce rights against the entity that put the ADR program together.	No. Holders of ADRs have no rights against the company; they must enforce rights against the entity that put the ADR program together.	No. Holders of ADRs have no rights against the company; they must enforce rights against the entity that put the ADR program together.

## VII. Corporate Governance Codes

	<b>Brazil</b>	<b>Chile</b>	<b>Mexico</b>	<b>South Africa</b>
<i>Has the government of your country, a local stock exchange, or SRO adopted a code of conduct or corporate governance code?</i>	No. The Brazilian Institute of Corporate Governance, however, issued a Code of Best Corporate Governance Practices in 1999.	No. The Superintendent of Securities and Insurance, however, is drafting a code.	Yes. Government agencies including the Central Bank and Mexican Banking Securities Commission issued the “Code for Improvement of Corporate Practices.” Public companies are required to publish a report on their compliance with the principles of the Code.	Yes. The King Report on Corporate Governance, which was compiled by the Institute of Directors in South Africa, was published in 1994. Listed companies on the Johannesburg Stock Exchange are required to disclose in their annual financial statement a statement commenting on the extent of their compliance with the Code of Corporate Practices and Conduct contained in the King Report.



Latin  
America

Africa

Brazil

# Brazil



This memorandum was prepared based upon information received from Tozzini Freire Teixeira e Silva Advogados, of Sao Paulo, Brazil. The information contained herein is current as of July 1, 2000.<sup>1</sup>

## I. Rights of Shareholders<sup>2</sup>

### A. Share Ownership

The shares of a corporation may be divided into several classes, each with differing rights and obligations. Listed corporations may only have one class of common shares, while unlisted corporations may have more than one class of common shares that may (i) be convertible into preferred shares, (ii) be restricted in ownership to Brazilian citizens, or (iii) grant a separate right to shareholders to appoint members of the corporation's management. Listed corporations and unlisted corporations may each have more than one class of preferred shares.

### B. Voting Rights of Shareholders

Voting rights are determined by a combination of statute and corporate articles of association or by-laws. Although different classes of stock may have different voting rights, the voting rights attributable to shareholders of the same class generally have to be equal and each shareholder is entitled to one vote for each share held on proposals to be voted upon at a shareholders meeting. By-laws of a corporation may modify the one share, one vote principle.

Preferred shareholders may or may not be granted the right to vote or may have restricted voting rights. Irrespective of any limitations, holders of preferred and common shares acquire voting rights if a company begins liquidation proceedings. Non-voting preferred shareholders also may acquire voting rights if the company fails to pay mandatory dividends within a specific period and may be granted the right to elect one or more members of management. Preferred shareholders also have specific voting rights with respect to certain corporate restructuring actions, such as mergers and spin-offs, and may be granted the right to elect, by separate vote, one or more members of management.

If a vote of general shareholders affects certain rights of preferred shareholders, the non-voting preferred shareholders must ratify or approve the resolutions of the general shareholders. For such a meeting of non-voting preferred shareholders, a quorum of 50% of the affected class

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<sup>1</sup> The information is based on (i) Brazilian Law No. 6,404 of December 15, 1996, as amended and restated by Law No. 9,457, dated May 5, 1997, known as the "Brazilian Corporation Law;" (ii) Brazilian Law 6,385, dated December 7, 1976, known as the "Capital Markets Law;" (iii) Brazilian Law 4,595, enacted on December 31, 1964, known as the "Banking Law;" (iv) the regulations enacted by Brazilian Securities and Exchange Commission ("CVM") and the Central Bank of Brazil ("Central Bank") as currently in force; and (v) other regulations and laws as appropriate.

<sup>2</sup> This information is based primarily on the Brazilian Corporation Law.



of preferred shareholders is required. There are no special shareholding requirements to call a meeting of non-voting preferred shareholders. For requirements to call a general meeting of shareholders, see Section 1.C.3.

Cumulative voting is permissible only for the election of directors.

The right of foreign investors to vote their shares is not subject to any restrictions or limitations that do not otherwise apply to domestic investors. Nevertheless, as mentioned above, the by-laws of unlisted companies may restrict ownership of shares to Brazilian citizens.

## C. Shareholders Meetings

General shareholders meetings may be annual or special. Annual shareholders meetings are held to consider and review financial statements and profit distributions and elect officers and members of the fiscal council, where such a council exists.<sup>3</sup>

Special shareholders meetings are held to consider amendments to the by-laws, which also may be subject to the approval of preferred shareholders if the by-laws so provide. Special shareholders meetings also may be held to consider the removal of officers and members of the fiscal council, issuance of debentures, suspension of voting rights, appraisal of assets contributed to pay for subscribed capital, reorganization, merger, spin-off, dissolution, liquidation and bankruptcy of the company, as well as other matters of interest to shareholders.

### 1. Record Date

Brazilian corporate law provides that a shareholder's ability to vote at a meeting is based on share ownership as recorded on the company's books on the date of the shareholders meeting. Once shares are registered, shareholders are entitled to vote (if shares are not otherwise restricted) and receive dividends.

Shares can be transferred prior to the meeting date. The new owner may vote its shares if the ownership information has been changed in the registry book to reflect the new owner information.

If a meeting is adjourned, shares may be freely transferred during the adjournment and the new owner may vote the shares if the ownership information in the registry book has been changed as provided above.

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<sup>3</sup> The fiscal council supervises the board of directors, company managers and officers. They are, in effect, an Internal Auditing Committee.

## 2. Notice Requirements for Shareholders Meetings

Companies in Brazil are required to announce shareholders meetings. The annual meeting of shareholders must be held during the first four months after the closing of the fiscal year, and special meetings are held as necessary.

Notice of shareholders meetings shall be made by a notice published on at least three occasions in an official government newspaper as well as a newspaper of wide circulation published in the location of the company's head office. The first notice must be published at least eight days before the meeting. If the meeting is adjourned, notice must be published at least five days before the adjourned meeting. Notices are required to be published only in Portuguese and shall include the place, date, time, and agenda. An item not included on the agenda cannot be validly voted upon at the meeting.

In addition, any shareholder holding 5% or more of the capital stock in a privately held company must be notified by telegram or registered letter sent at least eight days prior to a shareholder meeting, if such notification was requested. If notification is requested, such request shall be valid for a period not to exceed two fiscal years, which period may be renewed.

There are no special notice requirements imposed upon companies that have taken affirmative actions (such as establishing ADR or GDR programs) to qualify their shares for trading outside of Brazil.

## 3. Shareholder Proposals

Holders of shares representing 5% or more of the outstanding voting capital may call a special meeting whenever they have requested such to the corporate officers and the request has not been addressed within eight days.<sup>4</sup> In addition, any shareholder, regardless of the type or percentage of shares owned, may call a special meeting when the company's fiscal council has called for a special meeting, corporate officers have delayed in calling the meeting requested for 30 days, and the fiscal council subsequently has failed to call a special meeting within 60 days of the initial 30-day period.<sup>5</sup> There are no procedural or substantive limitations on the proposals a shareholder may submit for shareholder consideration if the proposals serve the corporation's goals and contribute to its preservation/development.<sup>6</sup>

If the board is composed of fewer than five members, shareholders having at least 20% of the voting stock are entitled to nominate and elect one board member. Shareholders holding at least 10% of the voting stock are entitled to request, 48 hours before a general meeting,

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<sup>4</sup> A depositary owning 5% or more of the outstanding voting capital may call a special meeting as a matter of right so long as it is not precluded from doing so under its depositary contract.

<sup>5</sup> The type of shareholder ownership (*i.e.*, common stock, depositary receipts, preferred stock) by itself should not affect the right to call a shareholders meeting.

<sup>6</sup> A dispute as to whether a proposal serves the corporation's goals ultimately is determined judicially.

an election procedure using cumulative voting procedures, which could cause minority shareholders to be able to elect members of the Board.<sup>7</sup>

A shareholder may, at a general shareholders meeting, propose the removal of a director from the board for public policy reasons so long as the proposed action is on the meeting agenda.

#### 4. Proof of Shareholder Status

To be a legally recognized shareholder for purposes of voting shares at a shareholders meeting, a shareholder must, upon request, provide proof of identity and, if the shareholder is an owner of a book share or a share held in custody, the shareholder must exhibit a voucher issued by the depositary financial institution or provide a certificate or document proving that the shares are held at either the company's headquarters or at the depositary financial institution. If the shareholder owns bearer shares, the shareholder must exhibit a receipt of deposit.

Generally, book entry shares are held in the name of the shareholder, and not in the name of the depositary institution, custodian, or broker. The shareholder would vote the shares at a shareholders meeting. A depositary institution, such as a custodian, may vote shares pursuant to a power of attorney granted by the shareholder. Brazilian law requires that a person or entity voting on its own behalf at a shareholders meeting must vote all shares consistently (*i.e.*, all in favor of or against a proposal). However, if voting authority has been delegated to a proxy, the proxy may vote shares for one shareholder in favor of a proposal and shares for another shareholder against the same proposal, in accordance with the proxy grantors' instructions.

#### 5. Attendance at Shareholders Meetings

There are no restrictions placed by Brazilian corporate law on shareholder attendance at annual and special shareholders meetings. Holders of non-voting shares are allowed to participate and discuss the agenda at a shareholders meeting.

A record owner may attend a shareholders meeting and vote the shares only if the record owner presents a power of attorney<sup>8</sup> executed by the beneficial owner<sup>9</sup> granting the record owner power for such purposes. A person serving as proxy for a foreign investor must have a power of attorney granted by the foreign investor, which must be consularized, notarized, and translated into Portuguese by a sworn translator.

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<sup>7</sup> Only persons holding at least one share of the company may be elected directors.

<sup>8</sup> This power of attorney cannot exceed one year, but it may be extended from year to year.

<sup>9</sup> A "beneficial owner" is the owner of a security registered in another's name (such as in the name of a broker).

A representative of a corporate shareholder must present: (1) proof of ownership (the share certificates or ownership proof issued by the depositary institution); and (2) proof of identify and proof of authorization to act as a representative of the company. This documentation must be consularized and notarized and translated into Portuguese by a sworn translator.

Companies do not restrict shareholders from attending annual or special shareholders meetings, and shareholders are permitted to ask questions at a meeting. Brazilian Corporation Law provides that a member of corporate management and the company's independent auditor, if any, shall be present at the shareholders meeting to answer questions. Should such individual(s) not be present, the meeting may be postponed at the shareholders' request. The meeting also may be postponed if a shareholder requires further clarification on a question and the answer is not available at the meeting.

A shareholder only can be accompanied by another shareholder or a lawyer at a shareholders meeting. Translators, serving only as such, therefore may not be permitted to attend.

## 6. Proxy Voting

Shares may be voted by representatives to whom voting authority is delegated by a shareholder. Such delegates may vote by attending a meeting in person or by sending in a form of proxy by mail depending on the specific requirements of a given proxy. Delegates of a shareholder must be one of the following: (i) another shareholder; (ii) a management representative of the company; or (iii) a lawyer. If the shareholder is a listed company, the delegate also can be a financial institution.

Foreign investors must be represented by a proxy granted to a local attorney or other representative for all purposes not involving voting. Foreign investors wishing to vote by proxy must file a power of attorney that is notarized and consularized in the country of origin of the investor. The power of attorney must be sworn, translated, registered with the registry of title and deeds, and filed with the relevant company in order for the votes to be counted at the meeting.<sup>10</sup>

A proxy (including a bank, custodian, or other nominee) can act on behalf of more than one shareholder and in so doing can vote in favor of a given proposal on behalf of one client and against that same proposal on behalf of another. However, the grantor of the proxy may not split its total shares and vote some "for" a proposal and others "against" the same proposal.

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<sup>10</sup> A power of attorney is valid for a period of up to one year.

## 7. Quorum

The quorum necessary for shareholders meetings ranges from one-quarter to two-thirds of the outstanding voting capital of a company, depending on the type of action to be taken. The quorum dictated by a listed company's by-laws may be higher depending on the matters to be discussed at the meeting but must be consistent with those provided in Brazilian Corporation Law. The general rule is 25% of outstanding voting capital must be present to constitute a quorum, but some matters require that at least 50% of outstanding voting capital be present.<sup>11</sup> In certain instances, the Brazil Securities Commission may authorize a reduction of the necessary quorum for listed companies voting on certain issues.

To determine whether a quorum is present, shareholders must sign an attendance book, providing their name, nationality, and residence, as well as the number, type, and class of shares owned. The chairman of the meeting then counts the number of shareholders present and determines if a quorum is present.

If a quorum is not present, a second call for a meeting will be made, at which the meeting shall be opened without any specified number of shareholders being present.

## 8. Voting and Supermajority Provisions

A shareholder may vote his shares either by attendance at the shareholders meeting or by proxy. Shareholders holding 5% or more of the total outstanding voting capital can force the call for a special meeting at which the shareholders' agenda must be addressed.<sup>12</sup>

There are no limitations on the voting of shares. Each common share entitles its holder to one vote on resolutions addressed at a general shareholders meeting unless company by-laws provide otherwise. As noted above, preferred shareholders may or may not be granted the right to vote or may have restricted voting rights.

Resolutions generally require the approval of a simple majority of votes cast (unless otherwise specified by the company's by-laws) to approve: creating preferred shares or increasing an existing class without maintaining its ratio to the other classes; altering a preference, privilege, or condition of redemption or amortization conferred upon one or more classes of preferred shares, or creating a new, more favored class; creating participation certificates; altering the mandatory dividend; changing the objectives of the company; merging the company with another company or consolidating or dividing it; dissolving the company or terminating a state of liquidation; and participating in a group of companies.

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<sup>11</sup> Specifically, there is a distinction between an installation quorum and a voting quorum.

<sup>12</sup> See "Shareholder Proposals" section above.

A company may require a supermajority vote for all or some measures. There are no supermajority requirements dictated by law.

## 9. Voting Tabulation and Results of Shareholders Meetings

The chairman of the meeting is responsible for counting votes and generally does so manually. There is no formal procedure for counting votes established by law, nor is this information typically found in a company's corporate articles. The proceedings and resolutions of the general meeting shall be recorded in minutes signed by the presiding board and by the shareholders attending the meeting. For the minutes to be valid, they must be signed by as many shareholders as constitute the majority necessary for the resolutions passed. Attested or certified copies shall be made of the minutes.

The minutes may provide a summary of what occurred, including dissents and protests, and may contain only a record of the resolutions addressed, provided that:

- (a) the documents or proposals submitted at the meeting, and the votes or dissents, are numbered in sequence, authenticated by the board and by any shareholder wishing to do so, and are filed with the corporation; and
- (b) the board, upon the request of any interested shareholder, authenticates a copy of any proposal, vote, dissent statement, or protest made.

A general meeting of a publicly held corporation may authorize the publication of minutes without the signatures of the shareholders. If the minutes are not recorded in the manner described immediately above, only an extract of the resolutions considered and what transpired at the meeting may be published.

As stated above, shareholders generally are entitled to one vote per share. Nonetheless, company by-laws may allow one or more classes of preferred shares to have cumulative voting rights to elect one or more members of the administrative bodies by separate ballot. These shares are usually referred to as "Golden Shares." In addition, a company's by-laws may require that specific amendments be approved at a special shareholders meeting by the shareholders of one or more classes of preferred shares.

A formal count of votes usually is not pursued and there is no provision in the Brazilian Corporation Law requiring such a procedure. Sometimes, when there is not a supermajority requirement, the chairman of the meeting merely asks if anyone is against a particular resolution and if no one objects, the resolution is considered approved.

Likewise, there is no inspector of elections. The chairman of the shareholders meeting is responsible for verifying results. If a shareholder has reason to believe that a particular shareholders meeting should be declared void, he can pursue such a matter in court.

Shareholders wanting independent verification of a vote must get the support of a majority of shareholders attending the meeting. A company's corporate articles may require a higher vote in order for shareholders to obtain an independent verification.

Minutes of all shareholders meetings must be prepared, filed with the competent Board of Commerce and, in the case of listed companies, must be published in at least two newspapers. The minutes of any shareholders meeting are public. Access to other information, such as a company's corporate books, may be requested of the company by any shareholder or third party with an interest in the company.

#### **D. Rights of Minority Shareholders in Corporate Transactions**

A corporate transaction (such as a merger, acquisition, spin-off, or liquidation), which might negatively affect the shareholder's rights or value of the shareholder's shares, must be approved by shareholders at a meeting. Where the decision reached at a shareholders meeting is contrary to the interests of a minority shareholder, that shareholder may be entitled to dissenter's rights. This remedy is available in certain specified circumstances, including when: (i) preferred shares or a disproportionate increase in existing classes are created, unless contemplated in the by-laws; (ii) changes are adopted in the preferences or in the redemption or amortization terms of one or more classes of preferred shares or the creation of a new, more favored class; (iii) there is a reduction of the mandatory dividend; (iv) a merger or consolidation into another company occurs; (v) and a change of corporate purposes is approved.

With respect to items (i) and (ii), dissenter's rights are available only to shareholders prejudiced by the decision of the shareholders meeting. With respect to items (iv) and (v), dissenter's rights are available only when certain tests of liquidity are not met by the shares.

If a corporate transaction does not need to be approved by shareholders, remedies may still be available if management has breached its duties in approving the transaction.

A shareholder may not object to actions taken by a majority shareholder or management in a corporate transaction where the actions are taken without an abuse of power or breach of managerial duties. Shareholders are limited to exercising voting rights when available.

By law, there is currently no minimum percentage at which a shareholder could be forced to redeem or sell his shares. That decision is dependent upon the company's by-laws or a decision reached at a general meeting of shareholders.

The calculation of the reimbursement value of shares may be governed by company by-laws, and such value only can be less than book value if it is based on the economic value of the shares as certified by independent appraisers.

## E. Transferability of Shares

There are no specific limitations on the ability of foreign or minority shareholders to sell or transfer shares of a company. There are, however, certain limitations on the ability of all shareholders to transfer shares. The Brazilian Corporation Law has rules governing the mechanics of shareholders purchasing and selling shares and the preferences in acquiring shares.<sup>13</sup> The ability to sell or transfer shares may be restricted by a shareholder agreement. In addition, where shares are not fully paid and the shares are sold to a third party, both the selling and the purchasing parties remain jointly liable for payment of the subscription price of the shares for two years. After the two-year period, joint liability ceases to exist. Finally, a shareholders meeting may suspend the rights of shareholders who have not complied with their legal obligations and/or those obligations established by company by-laws.

## F. Accounting

There is no right to request an accounting under Brazilian corporation law. Shareholders have the right, however, to examine, discuss, and vote upon the company's financial statements. Non-listed and listed companies are required to publish periodic information (including financial statements) in at least two newspapers. In addition, listed companies are required periodically to provide the CVM and the stock exchanges on which their securities are traded with specific information.<sup>14</sup>

## G. Inspection Rights

Shareholders have inspection rights. In addition, as indicated above, the following documents are publicly available: (i) minutes of shareholders and board of directors meetings, (ii) financial statements, and (iii) by-laws.

The Brazilian Corporation Law provides that any person with an interest in a listed company may request a "*certidão de assentamento*," which is a summary of information contained in the share and beneficiary books and the transfer book. When a person requesting information does not, in the company's view, have a real interest in the company, the issuance of a *certidão de assentamento* may be denied. This decision may be appealed to the CVM.

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<sup>13</sup> For example, Article 29 provides that a share of a publicly held corporation may only be traded after 30% of its issue price has been paid; Article 171, paragraph 1(c) provides that should shares of a new type or class be issued, each shareholder shall have a right of first refusal to all types and classes of shares created by the increase, in proportion to the number of shares he owns; and Article 171, paragraph 6 provides that a shareholder may assign his right of first refusal.

<sup>14</sup> Periodic information consists of: (i) financial statements and, if applicable, consolidated statements, accompanied by a management and independent accountant report; (ii) standardized financial statements (usually referred to by their Portuguese acronym "DFP"); (iii) a notice calling the annual meeting of shareholders; (iv) Annual Information (usually referred to as "IAN"); (v) minutes of the annual meeting; (vi) copies of the security certificates issued by the company if there was any change in those provided previously; and (vii) Quarterly Information Report (usually referred to as "ITR").



Finally, the Brazilian Corporation Law also provides that other books not publicly available (including minutes of shareholders, board of directors, and fiscal council meetings) may be requested judicially by holders of shares representing at least 5% of the company's corporate capital where such shareholders seriously suspect the company's management has engaged in corporate irregularities and/or illegalities.<sup>15</sup>

## II. Payment of Dividends

Companies publicly announce the payment of a dividend. Generally, all shareholders are entitled to a mandatory dividend each fiscal year.<sup>16</sup> Shareholders entitled to receive a dividend are those listed on company records on the date on which the board of directors, executive committee, or vote of a shareholders meeting determines a dividend will be paid. Preferred shareholders, except where entitled to a minimum or fixed dividend, whether or not cumulative, are entitled to receive a preferred mandatory dividend at least 10% greater than the common share dividend. However, an unlisted company is not required to pay mandatory dividends and may fully retain profits, upon unanimous approval at a general shareholders meeting.

Different classes or types (e.g., preferred or common) of shares may confer different dividend payments. Accordingly, the criteria for differential dividend payment is always based on the type of share held as opposed to the status of the shareholder (majority vs. minority) or the shareholder's nationality. Likewise, different payment schedules are not permitted for minority and majority shareholders nor for domestic or foreign shareholders.

Dividends are paid by check made to the order of the shareholder. The check usually is mailed to the shareholder or deposited in a shareholder's account. Dividends are payable only in Reais, the Brazilian currency. Where a foreign shareholder's investments are registered with the Central Bank of Brazil, the company may convert the dividends into a foreign currency for remittance abroad.

## III. Affiliated Transactions<sup>17</sup>

The officers of a company may not benefit an associated, controlling, or controlled company to the detriment of their own company and shall ensure that transactions between companies must be at "arm's length." Officers shall be liable to the company for any loss resulting from any such violations.

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<sup>15</sup> Whether management has engaged in such activities is ultimately to be determined by the courts.

<sup>16</sup> Unless a company's by-laws provide otherwise, shareholders are entitled to half of the fiscal year net profit increased or decreased by amounts used for: (i) the formation of a legal reserve; (ii) the formation of a contingency reserve and reverse contingency reserves of previous fiscal years; and (iii) unrealized profits transferred to reserves and prior profits transferred to such reserves that have been realized in the current fiscal year.

<sup>17</sup> This information is based primarily on the Brazilian Corporation Law.

There also are restrictions on transactions entered into by a company with its affiliates including, among others, a prohibition on financial institutions granting loans and issuing guarantees in favor of companies under their control.

Transactions between the issuer and its officers, directors, or employees must be at arm's length. An officer may not take part in any corporate transaction where his interests conflict with company interests, nor in the decisions made by other officers on such a matter. The officer shall disclose his disqualification to the other officers and shall cause the nature and extent of his interests to be recorded in the minutes of the board of directors meeting. Any business conducted other than at arm's length is voidable, and the officer shall be obligated to transfer to the company all benefits that he may have obtained.

## IV. The Role of Local Regulators and Stock Exchanges in Enforcing Shareholder Rights

### A. Responsibility of the Board of Directors

A board of directors is mandatory in publicly held corporations and those whose by-laws provide for "authorized capital," whether publicly held or not. The by-laws of a closely held corporation also may provide for the existence of a board of directors.

Brazilian Corporation Law establishes the duties applicable to a company's board of directors and executive officers, including, but not limited to, fiduciary duties to the company, disclosure duties, and due diligence duties. Directors generally are held personally and jointly liable for damages caused by a breach of fiduciary duty. In addition, the Brazilian Corporation Law imbues a "controlling shareholder" with important duties and responsibilities toward the corporation, other shareholders, corporation employees, and the community in which the corporation operates. The "controlling shareholder" shall be liable to other shareholders for damages caused by abusive acts, as described in the corporation's by-laws.<sup>18</sup>

Under Brazilian Corporation Law, an officer shall not be personally liable for the commitments he undertakes on behalf of the company and by virtue of action taken in the ordinary course of business. He shall, however, be liable for any loss caused when he acts: (1) within the scope of his authority, with fault or fraud; or (2) contrary to the provisions of the law or of the by-laws. In the past, officers were not often found liable in practice. It is believed that this may be changing and officers will be held more accountable.

### B. Enforcement of Rights by Local Regulators

The CVM is the Brazilian governmental agency responsible for implementing the policies established by the National Monetary Council regarding the organization and operation of the securities industry. The CVM is, in practice, the primary regulator charged with protecting the rights of shareholders.

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18 A controlling shareholder generally controls 50% + 1 of a company's shares.

Among the duties of the CVM are the issuance of regulations concerning: the issuance of securities to the public in Brazil, the negotiation and brokerage activities of the Brazilian securities market, the organization and operation of the Brazilian stock exchanges and securities market, the custody of securities, and the auditing of publicly held corporations. In addition, the CVM is responsible for (i) administration of the registration of publicly held corporations and the registration of issues and/or distributions of securities to the Brazilian public; (ii) disclosure of information relating to the market, the persons that operate in the market, and the securities traded therein; and (iii) the inspection of publicly held corporations, especially those not earning profits or not paying minimum mandatory dividends.<sup>19</sup>

The local stock exchange does not oversee shareholders rights directly. Its role, in practice, is more related directly to regular trade and settlement conditions, the responsibilities of brokerage houses, and guaranteeing fair market practices.

### C. Enforcement of Rights through the Judicial System

The administrative measure available to shareholders that believe their rights have been violated is to file a report requesting that CVM investigate an alleged violation. The fiscal council of a corporation shall denounce the board or executive board of officers of the company where they have failed to protect the interests of the company.

As to the judicial measures available to shareholders that believe their rights have been violated, shareholders representing 5% or more of the outstanding corporate capital of the company and any minority shareholder can initiate a suit and seek damages caused by a controlling shareholder failing to perform his duties.<sup>20</sup>

A minority or foreign shareholder seeking to enforce his rights in the Brazilian judicial system can do so if, having no immovable assets in Brazil, he pays a pledge sufficient to cover the legal fees and court expenses of the defendant should the defendant successfully defend against the suit. A non-resident person is entitled to full access to the courts of Brazil on the same terms as are available to residents and citizens of Brazil.<sup>21</sup>

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19 *In order to perform the duties described above, the CVM may: examine accounting registers, books, or documents; summon and fine individuals; request information from any governmental office or agency or government-owned company; order publicly held corporations to republish corrected financial statements or any other report or information disclosed to the public; and determine through an administrative investigation any illegal acts or non-equitable practices committed by officers, directors, or shareholders of publicly held companies, brokers, or any other persons participating in the market. In addition, and to prevent or correct anomalous market situations, the CVM may (i) suspend the negotiation of any security or order the suspension of the activities of any stock exchange; (ii) suspend or cancel the registrations of companies or securities offers; (iii) publish information aimed at clarifying or giving instructions to the participants of the securities market; or (iv) prohibit actions that may be harmful to the regular activity of the market.*

20 *Controlling shareholders are obligated to exercise their powers consistent with company objectives and have obligations and responsibilities to other shareholders, employees, and stakeholders whose rights and interests they must respect and meet.*

21 *Brazilian counsel has noted that this is true in practice as in theory.*

A shareholder need not exhaust administrative remedies with the issuer before bringing suit.

## V. Financial Information and Auditors

Financial statements, including annual balance sheets, accumulated profit and loss statements, income statements, and source and application of funds statements, must be prepared under the direction of the executive board of officers of the company, audited if the company is listed, approved by shareholders, and published. Financial statements must be prepared and released annually and quarterly and are available to shareholders. Brazilian corporate law does not require reports to be printed in any language other than Portuguese.

Listed companies also are required to provide the CVM, the stock exchanges upon which their securities are traded, and the public with specific, periodic, and sporadic information.<sup>22</sup> Listed companies also are required to disclose any “relevant facts,” which refer to any deliberation at a shareholders meeting or governing body of a publicly held company, or any other information about the company that could substantially influence: (i) the value of the company’s securities; (ii) the decision of investors in trading a company’s securities; or (iii) the decision of investors to exercise rights in connection with the ownership of a company’s securities.

Only accounting firms and independent auditors duly registered with the CVM may audit financial statements of listed companies. The independence of auditors from management is a preliminary requirement in order to be registered with the CVM.

The Capital Markets Law governs, among other issues, the auditing rules applicable to listed companies. It delegates competence to the CVM on rules governing (i) the auditors’ registration and professional conduct and (ii) the selection, resignation, or termination of an auditor.

Generally, an accountant of a listed company has to inform CVM of any irregularity he finds in connection with his work within 20 days.

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22 For a description of “periodic information,” see footnote 14. Sporadic information consists of: (i) a meeting notice calling a special meeting of shareholders; (ii) the minutes of any special general meeting of shareholders; (iii) the execution of any shareholder agreement; (iv) an agreement forming a “group of companies” as that term is defined by the law; (v) information on any petition for “concordata” (court-approved composition or reorganization or chapter eleven equivalent with creditors); (v) a court decision granting “concordata;” (vi) information on any petition for or acknowledgment of bankruptcy; (vii) a decree of bankruptcy; and (viii) other information requested by the CVM.

## VI. Depositary Receipts/Nominee Rights

Holders of depositary receipts (such as ADRs or GDRs) are not recognized in Brazil as the holders of the securities underlying the depositary receipt program. Rather, the custodian, on behalf of the depositary, is recognized as the holder of the securities underlying the depositary receipt program. Nevertheless, pursuant to the contractual arrangement, the receipt holders may be eligible to vote the relevant shares.

ADR or GDR holders may attend shareholders meetings but must give instructions to the depositary/custodian to vote on their behalf. Likewise, standing to seek redress must be effected through the custodian on whose name the shares are held.

## VII. Corporate Governance Code

The Brazilian Institute of Corporate Governance (BICG) issued a Code of Best Corporate Governance Practices in 1999. The Code focuses primarily on the board of directors. The BICG is a non-profit entity organized in 1995, which is comprised of executives, consultants, members of corporate boards of directors, and experts in business administration.





Latin  
America

Africa

# Chile

This memorandum was prepared based upon information provided by Carey y Cia Ltda. of Santiago, Chile and addresses the law and general corporate practices of companies in Chile. The information is based on Law No. 18.046 on Corporations (“Act”) and its corresponding regulations (“Regulations”), and Law No. 18.045 on the Securities Market (“Securities Act”) and is current as of July 1, 2000.<sup>1</sup> The government agency that supervises securities market activity is the Superintendent of Securities and Insurance (“SVS”). Chilean corporations implement “*estatutos*,” which serve the function of both corporate articles and bylaws (“Articles”).

Under Chilean law, corporations may be either “open” or “closed” corporations. Open corporations include: (i) those that offer their shares to the public under the Securities Act; (ii) those that have 500 or more shareholders; and (iii) those that have 100 or more shareholders that own 10% or more of the subscribed capital. Open corporations must register in the National Registry of Securities and their actions are subject to the SVS. Only open corporations can offer their securities on the Chilean stock exchanges. All other corporations are “closed” corporations. However, closed corporations can elect to become subject to the laws and regulations that govern open corporations by registering in the National Registry of Securities.

This report covers the corporate governance rules applicable to both open and closed corporations. Unless otherwise specified, information applies to both open and closed corporations.

## I. Rights of Shareholders<sup>2</sup>

### A. Share Ownership

Chilean companies are permitted to issue different classes of stock having different voting and/or distribution rights. Shares of the same class must have the same rights. Specific provisions governing the different classes are required in the Articles.

### B. Voting Rights of Shareholders

Voting rights are determined by the Articles, unless they are contrary to the Act. The Act requires a one share, one vote system. The Articles are permitted to establish classes of preferred stock with limited or no voting rights; however, no share can have more than one vote. The voting rights of a particular class of shares can be altered by a resolution of the shareholders that must pass by a two-thirds majority of the holders of the affected class at a general shareholders meeting. Chilean law does not contemplate the calling of a shareholders meeting for only a class of shareholders.

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<sup>1</sup> A new bill before the Chilean Congress regarding corporate governance is referenced in this memorandum and is more fully described in Annex A.

<sup>2</sup> Information provided in this section is based principally on the Act.



Under the Act, non-voting and limited voting shares have the right to vote on issues that directly affect their shares (e.g., if their rights to dividends or other privileges are to be altered) and when the privileges granted to these shares in exchange for their limited-voting status have not been observed (e.g., if the preference dividend is not paid). In the latter case, the voting right will expire when the required payments are made. If an issuer does not comply with the preferential rights of non-voting shares, the non-voting shareholders may call a shareholders meeting if their shares represent 10% of the outstanding voting shares.

The Act requires the use of cumulative voting for the election of board members. Under cumulative voting, shareholders may either cast all their votes in favor of one person or distribute them amongst all of the candidates.

Foreign investors are not subject to any special restrictions or limitations on voting rights. However, holders of ADRs are not registered shareholders and thus do not have voting rights. The depositary institution would be the registered shareholder and would have voting rights (a proxy may be appointed by the Chilean issuer to vote for the ADR holders — see Section VI).

## C. Shareholders Meetings

### 1. Record Date

Under the Act, corporations are required to maintain a shareholders register recording the name, domicile, and national identity number of each shareholder, the number of shares held, the date of their registration, and any transfer of shares that has occurred. The registration does not determine ownership of shares but, rather, only affects a shareholder's rights regarding the company. Registration into the shareholder register is not automatic upon the purchase of shares; the purchaser must present certain documents to the company in order to be added to the shareholders register. In practice, this process can take several days.

Record dates are used to determine voting rights. Under the Act, only shareholders listed on the register on the fifth business day prior to the date of a shareholders meeting are entitled to attend the meeting and vote their shares. The shareholders register is not closed after this date; shares can be freely traded, and the purchaser can register itself as the new shareholder on the register at any time. However, although not expressly stated in the Act or the Regulations, neither the transferor nor the transferee of shares after the record date will be entitled to attend the meeting or vote the shares. The transferor will lose this right because it is no longer a shareholder, and the transferee will not gain this right because it did not meet the date recordation requirement. If a meeting is adjourned and reconvened, there is another record date before the second meeting.

### 2. Notice Requirements for Shareholders Meetings

Companies are required to provide announcements for the regular annual meeting and special meetings to the shareholders. The notice for either type of meeting must be published three times, either in a newspaper in the company's corporate domicile or in the Official Gazette.

The first notice must be published 15 to 20 days before the scheduled meeting. In addition, open corporations are required to mail notice 15 days in advance to each shareholder, the SVS, and the Chilean stock exchanges. Notices must be published in Spanish.

Unless otherwise specified by the depositary agreement, Chilean companies that have ADR or GDR programs are not required to give notice of shareholders meetings to the ADR/GDR holders. The Chilean company would give notice to the ADR/GDR depositary, just like any other shareholder.

Notices must state the type of meeting to be held and its date and location. The agenda of the meeting generally only is required in the notice for special shareholders meetings.<sup>3</sup> An agenda is not required to be given in the notice of an annual shareholders meeting.<sup>4</sup> No items can be added to the agenda of a special shareholders meeting that were not included in the notice. However, annual shareholders meetings can consider any matter permitted by the Act.

The following matters may be addressed at an annual shareholders meeting (and could be added into the agenda without notice): (i) review of the company's financial situation and auditor's reports; (ii) distribution of profits; (iii) election of directors and other company officials; and (iv) any matter "of social interest" that does not require a special shareholders meeting.

The following matters may be addressed only at a special shareholders meeting and could not be added to the agenda for a meeting without notice: (i) dissolution; (ii) merger or reorganization; (iii) issuance of convertible debt; (iv) conveyance of certain assets or liabilities; (v) the granting of pledges or liens on the company's assets to secure third-party obligations; and (vi) other matters that under Chilean law or the company's by-laws may be addressed only at a special shareholders meeting.

### 3. Shareholder Proposals

Chilean law specifically does not permit or prohibit shareholders to add proposals to the agenda of shareholders meetings. However, shareholders holding at least 10% of the voting stock can call an annual or special meeting to discuss any proposal/matter that is within the competence of a shareholders meeting. In order to convene a meeting, shareholders holding at least 10% of the voting stock must present a written request to the board of directors stating the agenda of the meeting. The board must then issue a resolution convening the meeting and must send out the required notices. The meeting must take place within 30 days after the date of the request. If the board refuses to call the meeting, the shareholders can file a lawsuit in court to enforce their request.

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<sup>3</sup> *With respect to a "closed" corporation, an agenda also must be included in the notice of an annual meeting called by shareholders holding 10% or more of the voting shares. With respect to "open" corporations, any additional notice of the meeting mailed to all shareholders must include a reference to the agenda items.*

<sup>4</sup> *It is not clear why the law does not require the inclusion of an annual meeting's agenda in the notice of the meeting. The result of this policy is that it is possible for an unscheduled proposal to be discussed and voted upon at an annual shareholders meeting without notice to shareholders.*

Shareholders can nominate candidates to the board of directors without restriction, but they cannot propose the removal of an individual board member. The shareholders can remove the entire board at one time, and install a replacement, by a majority vote in a special shareholders meeting.

Holders of ADRs/GDRs and non-voting shareholders do not have any right to call a meeting.

#### 4. Proof of Shareholder Status

Only shareholders registered in the shareholders register five days in advance of a meeting are entitled to attend and vote. Physical possession of the shares on the day of the meeting is not required. Where shares are registered in the name of a nominee, such as a brokerage firm or a custodian, those shares only can be voted by the nominee, unless the nominee delegates authority to vote as proxy to the beneficial owner<sup>5</sup> of the shares. A nominee could cast votes against a proposal with respect to certain shares and for a proposal with respect to other shares on behalf of multiple beneficial owners, provided that the nominee discloses that it is voting on behalf of more than one beneficial owner.

#### 5. Attendance at Shareholders Meetings

Any registered shareholder can attend a shareholders meeting, even non-voting shareholders, provided that they are registered in the company's shareholders register on the fifth day prior to the date of the shareholders meeting.

Shareholders who are individuals may attend a meeting in person or by delegating authority to another person to serve as proxy. If they attend in person, they must present their national identification card or their passport in the case of a foreign investor. Individual shareholders attending as proxy must provide the proxy document in writing. Corporate shareholders may attend meetings through proxies or corporate officers. A corporate officer must present documentation evidencing his authority to act as an officer on behalf of the corporation. All documents executed abroad must be consularized and translated into Spanish; they will be examined to confirm their validity before the meeting commences.

Shareholders are permitted to ask questions at a meeting and are allowed to bring translators. Even non-voting shareholders are permitted to express their opinions during the meeting ("right of voice").

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5 A "beneficial owner" is the owner of a security registered in another's name (such as in the name of a broker).

## 6. Proxy Voting

Shareholders can delegate authority to any other person/entity to act as a proxy to vote shares at shareholders meetings; voting by mail is not permitted. Foreign investors are not required to be represented by a local attorney or other representative. The proxy document must be in writing, translated into Spanish, and consularized. The proxy document can take the form of a private instrument or a public deed, but must contain certain declarations required by the Regulations. The proxy can exercise all of the voting rights that the shareholder would have had in person or through a corporate official.

No limitations exist for voting by proxy, except that a proxy cannot cast votes on behalf of a single shareholder both in favor of and against a proposal. A proxy can only divide the votes of a single shareholder in cumulative voting for election of board members. Proxies can act on behalf of more than one shareholder and are permitted to vote in favor of a proposal on behalf of one client and against that same proposal on behalf of another client. Shareholders, including a nominee, custodian, or broker, can utilize more than one proxy to cast votes in opposing directions.

## 7. Quorum

Chilean companies use the word “quorum” for both the number of shareholders required to convene a meeting and for the number of shareholders required to pass a resolution. Under the Act, the quorum to convene a shareholders meeting generally is a simple majority of the issued voting stock, present in person or by proxy. However, a higher quorum to convene may be required by the Articles, or for certain corporate transactions (see Section I.C.8. below). To determine whether the quorum to convene has been reached, proxies must be examined and all shareholders or representatives present at the meeting must sign a list of attendance.

If the quorum to convene is not reached, the meeting must be adjourned and reconvened within 45 days after the original meeting date. At the rescheduled meeting, shareholders present in person or by proxy will be deemed to constitute the necessary quorum to convene, regardless of the percentage of shares they represent.

## 8. Voting and Supermajority Provisions

Shareholders can vote their shares in person or by proxy. Although the shareholder can indicate how a proxy should vote in written instructions, the proxy must attend the meeting and cast a vote in order for the vote to be counted.

Unless a higher voting quorum is provided in the Articles, shareholders meetings pass resolutions by the affirmative vote of a simple majority of the voting stock present or represented at the meeting. However, the Law requires the approval of a two-thirds majority of the issued voting stock for the following actions (unless a higher quorum is specified in the Articles): (i) a change in corporate form, merger, or spin-off; (ii) an amendment to the company’s term of existence or early dissolution; (iii) a change in corporate domicile; (iv) a reduction of corporate capital; (v) the approval and valuation of capital contributions in assets other than cash; (vi) modifications to the authorities reserved for shareholders meetings or to the existing limitations on the powers of the board of directors; (vii) a reduction in the number of

members of the board of directors; (viii) the transfer of all corporate assets and liabilities or all corporate assets; (ix) any non-cash dividend distribution; or (x) the correction of formal defects in the company's Articles or organizational documents, regarding matters (i) – (ix). In addition, in order for share privileges to be created, amended, or suppressed, the approval of a two-thirds majority of the affected shares is required.

As more fully described in Annex A, the Chilean Congress currently is considering a bill that would require different supermajority voting requirements.

## 9. Voting Tabulation and Results of Shareholders Meetings

The general rule is that one share is equal to one vote. Unless otherwise agreed by a unanimous vote of the shares present or represented at a meeting, the following procedure must be observed for tabulation of votes and recording results. The president and the secretary of the meeting, with three individual shareholders appointed by the shareholders meeting, must make a written record of the votes spoken out loud by each shareholder or proxy present at the meeting, as identified on the attendance list. At its option, a shareholder or proxy may instead choose to submit a written vote on a vote card. The president or the shareholder representatives also can order that the shareholders vote by written vote card; this method is the usual practice for meetings with many attendees. The shareholders representatives scrutinize the individual vote cards, and then the president announces the votes in favor of and against the proposed resolution. The announcement must be done in such a way that every attendee can tabulate the votes and verify the results for themselves. After the announcement, the secretary officially will add the votes, and the president will announce the final results.

Thus, unless otherwise agreed by a unanimous vote of the shares present or duly represented at a meeting, votes will be tabulated and verified. Any shareholder or its proxy, regardless of nationality or the number of shares held, can demand that the full vote procedure be carried out.

The three appointed shareholder representatives must approve and sign the minutes of the meeting. These three shareholders, together with the president and the secretary, verify the integrity of the election process and the results of the votes. In addition, for open corporations, the SVS has the right to send an official to attend any shareholders meeting with full power and authority to verify the voting process.

Companies must record and keep minutes of every shareholders meeting. The minutes must record the following: (i) the names of the shareholders who attended and the number of shares they held or represented; (ii) summaries of the discussions and observations made during the meeting; (iii) summaries of proposals discussed and the voting results; and (iv) a list of the shareholders who voted against proposals. A matter may be excluded from recordation in the minutes only by the unanimous approval of the shares present at the meeting.

Every shareholder is entitled to receive a copy of the minutes upon request, and open corporations are required to file a copy of the minutes with the SVS. In addition, all of the documentary evidence of the shareholder voting process must be kept by the company for at least two years. It is the responsibility of the chief executive officer of the company to take appropriate measures to secure and maintain these documents in a safe place.

## D. Rights of Minority Shareholders in Corporate Transactions<sup>6</sup>

The rights of minority shareholders generally are protected by the supermajority voting requirements described above (see Section I.C.8.).

Dissenting shareholders cannot have their rights removed and cannot be forced to tender their shares in the event of a merger, spin-off, or other reorganization. Minority shareholders have dissenters' rights in the following types of transactions: (i) transformation of the company into a different type of entity; (ii) merger; (iii) transfer of all of the assets of the company; (iv) the creation of preferences for a class of shares or amendment of class preferences (in which case, only the affected classes of shares are entitled to dissenters' rights); and (v) any other situation provided in the Articles. To exercise their rights, the dissenting minority shareholders must have voted against the resolution or expressed written disagreement to the company within 30 days after the meeting at which the resolution was adopted. The dissenting shareholders then have the right to force the company to purchase their shares.

When a resolution triggering dissenters' rights is passed, the board of directors can elect to convene a new shareholders meeting, which must be held within 60 days after the initial shareholders meeting, to reconsider or ratify the resolution. If the resolution is revoked in the second shareholders meeting, the dissenters' rights are extinguished.

In closed corporations, the value of the dissenting shareholders' shares is the book value. In open corporations, the value is the market price; market price generally will be calculated as an average of prices for the stock on the Chilean stock exchanges during the prior six months.

As more fully described in Annex A, the Chilean Congress is considering a bill that would further regulate minority shareholder rights.

## E. Transferability of Shares

Chilean law does not limit the ability of shareholders, including minority and foreign shareholders, to transfer their shares. Moreover, corporations cannot adopt provisions limiting the transfer of shares in their Articles. If this type of provision is in a shareholder agreement, it must be reported to the company and noted in the shareholder register.

## F. Accounting

Open corporations are required to have their books and records audited by independent auditors, who are appointed by a majority vote of the shareholders at the annual regular meeting. The independent auditors must be registered with the SVS. Shareholders of open corporations also may appoint "account inspectors" in addition to the independent auditors. Account inspectors are two individuals, who can be shareholders, who have the authority to review the books and records of the company. Shareholders of closed corporations can elect to appoint independent auditors or "account inspectors" by a majority vote.

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<sup>6</sup> Information in this section is based principally on the Act.

Independent auditors and inspectors are entitled to review all the accounting books and records of a corporation with no limitation. They are entitled to inform the shareholders and authorities of any violation, misrepresentation, or breach found in the management or accounting of the corporation.

Chilean law does not provide any specific right for minority shareholders to seek an accounting. However, shareholders holding at least 10% of the voting stock can call a shareholders meeting to vote on the independent auditors or account inspectors for the company. Shareholders also are entitled to make a record in the annual report of their comments and objections to accounting and financial matters of a company.

## G. Inspection Rights

Shareholders can appoint account inspectors to inspect a company's books and records by a majority vote, as described in section F above.

For 15 days up to the annual shareholders meeting, shareholders have the right to inspect the annual report, balance sheet, inventory, minutes, books, and independent auditors' and account inspectors' reports of the company at no charge. Shareholders of open corporations holding a specified minimum investment automatically are sent a copy of the annual report, including audited financial statements. Shareholders who do not automatically receive a copy of the annual report have the right to request a copy.

In addition, a copy of the Articles, with all amendments, and a current list of all shareholders must be kept at the company headquarters. Shareholders have access to these documents at any time, at no charge.

## II. Payment of Dividends

Dividends, and their payment date, are declared by a majority vote of the shareholders at the annual regular meeting. However, the board of directors is entitled to distribute interim dividends out of profits earned during the interim period. In addition, a special shareholders meeting may declare dividends out of retained earnings.

The shareholders entitled to receive a dividend are determined in accordance with the shareholders register. To receive a dividend, a shareholder must be registered at least five days before the payment date of the dividend. Payment of dividends must be announced publicly by a notice published in a local newspaper, as designated by the shareholders meeting, or, if the shareholders meeting fails to designate a local newspaper, the notice must be published in the Official Gazette. The notice must be published within 20 days before the dividend payment date.

The Act requires open corporations to distribute an annual cash dividend equal to at least 30% of its annual consolidated net income, calculated in accordance with Chilean GAAP ("Minimum Dividend"). This rule does not apply if otherwise decided by a unanimous vote of the holders of the issued shares or to the extent the company has accumulated losses. Unless otherwise specified by the Articles, the shareholders can decide by a majority vote to distribute more than the Minimum Dividend. Closed corporations, on the other hand, can set the amount of dividend distributions in their Articles, but if the Articles are silent, the Minimum Dividend rule applies.

Under the Act, Minimum Dividends must be paid within 30 days after the date of declaration. The payment date for additional distributions can be set at the time of the declaration. Dividends that are declared but not paid on time are adjusted to reflect the change in the value of the *Unidad de Fomento*<sup>7</sup> and accrue interest at the rate set for the *Unidad de Fomento*. The right to receive a dividend lapses if the dividend is not claimed within five years from the payment date.

Dividends must be paid in proportion to the shares owned by each shareholder or, in the case of preferred stock, in accordance with the Articles. All outstanding shares of common stock are entitled to share equally in all dividends declared by a corporation and, therefore, no discrimination is permitted against foreign investors or minority shareholders.

The Minimum Dividend must be paid in cash and in local currency, unless otherwise decided by the unanimous vote of the holders of the issued shares. Open corporations can pay dividends in excess of the Minimum Dividend in cash, in that corporation's own stock, or in the stock of other open corporations held by that corporation, at the option of each shareholder. Shareholders who do not expressly elect to receive the dividend in stock will receive the dividend in cash.

Although not expressly stated in the Act, cumulative dividends can be authorized by a company's Articles. However, this is an unusual practice for open corporations. Closed corporations, on the contrary, have issued preferred stock with cumulative dividend rights in lieu of subordinated debt mechanisms.

### III. Affiliated Transactions<sup>8</sup>

The Act establishes certain rules regarding transactions with affiliates, including officers, directors, and related persons ("Related Transactions"). Transactions that benefit board members or officers, or their spouses or close relatives, are Related Transactions, as well as transactions involving other companies in which such persons are board members, or have direct or indirect control over 10% or more of the stock.

For both open and closed corporations, a Related Transaction is permissible only if: (i) it has been approved by the board of directors; (ii) the board approval is disclosed at the next shareholders meeting; and (iii) the transaction takes place on market, or "arm's length," terms. Related Transactions that do not comply with these rules are not nullified, but the board members and officers who approved the transaction are personally liable for damage suffered by the corporation and, for open corporations, also are subject to fines and administrative sanctions. In addition, the board members/officers who directly or indirectly benefit from the transaction must return the

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<sup>7</sup> *The Unidad de Fomento is a daily indexed, Chilean peso-denominated accounting unit designed to discount the effect of Chilean inflation and is based on the previous month's inflation rate as officially determined.*

<sup>8</sup> *Information provided in this section is based principally on the Act and the Securities Act.*



money to the company.<sup>9</sup>

Transactions between a corporation and its affiliates or subsidiaries, or between a corporation's affiliates and subsidiaries, also must be executed on "arm's length" terms. Transactions between a parent company and a subsidiary in which a board member may have an interest must be reported at the shareholders meetings of both companies.

There are no restrictions on the amount of stock any individual or entity can hold in a corporation (including its directors, officers, and employees), with certain minor exceptions, such as for banking institutions.<sup>10</sup> However, the transfer of stock to directors and officers is a Related Transaction and, therefore, cannot be made below market price. Although not expressly stated in the law, generally, it is believed that sales of stock to employees also cannot be below market price, unless otherwise resolved by a unanimous vote of the shareholders.

Under the Securities Act, any direct or indirect acquisition or sale of shares by directors and officers of a corporation must be disclosed to the SVS and to the Chilean stock exchanges within five days. There are no disclosure requirements for the acquisition or sale of shares by employees (other than managers).

## IV. The Role of Local Regulators and Stock Exchanges in Enforcing Shareholder Rights

### A. Responsibility of the Board of Directors

Chilean law requires the board of directors to represent the interests of all of the shareholders. The Act provides that even where a director only is elected by a specific group or class of shareholders, he still owes a duty to the company and all of its shareholders and cannot disregard this duty for the purpose of protecting the group/class that elected him. The Act also prohibits directors from:

- (i) proposing reforms, securities issues, or adoption of policies or decisions for their own benefit that are not in the interests of the company;
- (ii) hindering investigation of directors or executives of the company;
- (iii) inducing managers, executives, or employees to record inaccurate accounts, file wrong information, or hide information;
- (iv) presenting inaccurate accounts or false information to, or hiding information from, shareholders;

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<sup>9</sup> See No. 4(a) of Annex A for additional measures proposed in a new bill before the Chilean Congress.

<sup>10</sup> Any person acquiring 10% or more of the share capital of a bank must obtain the prior approval of the *Superintendencia de Bancos e Instituciones Financieras*.

- (v) borrowing money or assets from the company for their own benefit, or using the assets, services, or goodwill of the company for their own benefit without prior authorization from the board;
- (vi) using business opportunities of the company for their own benefit, with prejudice to the company; and
- (vii) committing acts violating the law or the Articles or using their office to obtain improper personal benefits at the expense of the company.

Directors can be held personally liable for breach of their fiduciary duties, and there is precedent for this in fact. The Act provides that directors shall be held jointly and severally liable for the damage caused to the company and to its shareholders by their fraudulent or negligent actions. In addition, in situations (v) – (vii), any benefits obtained by the director must be returned to the company. Directors can limit their liability for a board action only if their opposition to the action is stated for the record in the minutes. Directors' civil liability cannot be limited by contractual agreement or in the Articles. Moreover, approval of balance sheets and annual reports by a shareholders meeting does not exonerate board members from their responsibility for negligent or fraudulent action.

## **B. Enforcement of Rights by Local Regulators**

The Chilean securities market principally is regulated by the Securities Act, the Act, and Law No. 3538, which created the SVS. In total, Chilean law provides protection for minority shareholders, places restrictions on insider trading and price manipulation, imposes disclosure requirements, and grants the SVS ample authority to supervise open corporations and to issue regulations and impose fines and administrative sanctions. The SVS plays an active role, directly and indirectly, in the protection of minority shareholders' rights. The Chilean stock exchanges play a minor role because, among other reasons, they do not have the necessary regulatory authority.

The SVS has the right to suspend the offer, quotation, or trading of shares of any open corporation for up to 30 days, if suspension is necessary to protect shareholders' rights or is in the public interest. If, at the expiration of this period, the circumstances giving rise to the original suspension have not changed, the SVS may then cancel the corporation's listing in the National Registry of Securities. In addition, the SVS may impose penalties ranging from an admonition to fines on directors, managers, officers, and/or the corporation itself. Moreover, if the violations imply other civil or criminal offenses, the SVS may file a claim with the courts of justice.

### C. Enforcement of Rights through the Judicial System

The Securities Act and the Act, together with Chilean laws on civil and commercial default and breach of contract, allow shareholders to seek redress through the judicial system or through arbitration procedures for violations of their rights.<sup>11</sup> For instance, shareholders may bring claims for damages against any person who has violated the Act or its Regulations, thereby causing damage to the shareholder. Shareholders also may bring claims against board members for fraudulent or negligent action and for the damages eventually caused to the company and to its shareholders.

Furthermore, the SVS has the duty to investigate any complaint filed by a shareholder, investor, or any other interested party and can apply fines, administrative sanctions, or other remedies (including, in certain cases, cancellation of a company's registration).

No ownership minimum is required for a shareholder to seek redress through the courts or through the SVS, and there is no distinction made between domestic and foreign shareholders. In general, minority shareholders and foreign shareholders receive fair and adequate treatment from the courts. There is no obligation for shareholders to exhaust remedies with the issuer first.

There currently are no specific provisions under Chilean law regarding derivative suits; however, a bill is under consideration in the Chilean Congress that would permit shareholders holding 5% or more of a company's equity to sue for damages on behalf of the company.

### V. Financial Information and Auditors

There is a complete set of laws, regulations, and instructions governing the preparation and contents of annual and periodic financial reports (i.e., the Securities Act, the Act, the Regulations, and instructions issued by the SVS and the Internal Revenue Service). The required documents only need to be prepared in Spanish.

Under the Act, corporations must issue a yearly balance sheet reflecting the company's condition as of December 31 of that year. The balance sheet must be prepared by the board of directors and audited by the independent auditors and/or account inspectors (who issue a report). It then must be presented to the regular shareholders meeting, which must take place by the end of April of the following year. The shareholders meeting can approve or reject the balance sheet.

In addition to the yearly balance sheet, the board of directors must prepare an annual report, containing information about the business of the company during the last fiscal year. This report includes information on directors' compensation, Related Transactions, and the

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<sup>11</sup> Chilean law requires corporations to have arbitration procedures in their Articles to resolve disputes between shareholders or between the corporation and its shareholders. However, arbitration procedures are not mandatory, and shareholders may elect to file claims before the courts. In practice, arbitration proves to be faster, but more expensive, than court litigation.

company's dividend distribution policy. The annual report also must contain the comments and proposals of shareholders holding 10% or more of the issued voting shares.

The annual report is presented to the shareholders, along with the annual balance sheet, a profit and loss statement, and the reports issued by the independent auditors and/or account inspectors. All of these documents are filed with the SVS and the Chilean stock exchanges. These documents must reflect the financial situation of the company as of the end of the year and the profits earned or losses incurred during that period.

Under the Act, for 15 days prior to the annual shareholders meeting, the corporation must make the annual report, balance sheet, inventory, minutes, and reports issued by the independent auditors and/or account inspectors, available to the shareholders for review. Shareholders of open corporations holding a certain minimum investment automatically receive a copy of the annual report and the audited financial statements. Other shareholders have the right to request a copy of the annual report, free of charge. In addition, the SVS holds a copy of all such publicly available information.

Open corporations have additional information disclosure requirements; they must present quarterly financial statements to the SVS within 30 days after the close of each quarter. In addition, the Securities Act requires open corporations to provide the SVS with any material information regarding their business and/or their securities, as soon as these facts become known to the company's board of directors. This information becomes available to the public.

As noted above, the legal function of independent auditors, as well as account inspectors, is to examine the accounting records, balance sheet, inventory, and financial statements of a corporation and to issue reports regarding these documents to the shareholders. They also are more broadly required by law to supervise company operations and the acts of the management to ensure compliance with the law and the Articles.

Independent auditors must be duly registered with the SVS and are subject to its supervision. The SVS issues rules and instructions regulating the way independent auditors perform their functions. The SVS can cancel or suspend an auditor's registration when he does not fulfill his obligations properly.<sup>12</sup>

Under the Act, corporations must keep accounting records in accordance with Chilean GAAP.<sup>13</sup> The SVS also establishes principles regarding the preparation of accounting records by open corporations. The SVS can order adjustments to, or correction of, values or figures included in certain accounts, when the values or figures do not correspond to the real value of assets, liabilities, or other matters (as prescribed by Chilean GAAP).

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12 *Independent auditors for commercial banks and pension funds may be subject to additional requirements.*

13 *Chilean GAAP generally is the same as U.S. GAAP or International GAAP. One main difference, however, is that Chilean GAAP addresses inflation adjustments.*

The Act does not provide rules regarding resignation or termination of independent auditors. Because a corporation and its independent auditors are subject to a contractual relationship, matters dealing with resignation and termination generally are governed by their agreement. However, because the independent auditors are appointed by a vote of the shareholders, termination only may be agreed upon in a shareholders meeting. In any event, as a general rule, termination or resignation does not preclude independent auditors from informing the SVS or the courts, as the case may be, of any violation, misrepresentation, or breach found in the management or accounting of a corporation.

## VI. Depositary Receipts/Nominee Rights

As noted above, under Chilean law, the registered shareholder is the ADR depositary institution, not the holder of the ADRs. Thus, all shareholder rights (including attendance at meetings, voting, and dividend rights) belong to the ADR depositary institution.

The method by which ADR or GDR holders can exercise their rights is contained in the prospectus and corresponding depositary agreement executed by the Chilean issuer and the depositary institution. In general practice, these documents provide that the depositary institution must vote the underlying shares in accordance with the instructions of the ADR holders. If no instructions are received from a holder of ADRs, the general practice is that the depositary institution must grant a discretionary proxy to a person designated by the board of the Chilean issuer to vote the underlying shares.

Holders of ADRs cannot attend shareholders meetings and/or vote for themselves, unless the depositary institution has appointed them as proxy to vote the underlying shares.<sup>14</sup> Otherwise, in order to attend and vote for themselves, ADR holders must withdraw the shares represented by the ADRs, pursuant to the terms of the deposit agreement, and register themselves in the company's shareholder register five days prior to the shareholders meeting.

## VII. Corporate Governance Code

No code of corporate governance or corporate conduct has been adopted in Chile; however, the SVS is in the process of drafting one.

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<sup>14</sup> *In practice, ADR holders who do show up at shareholders meetings generally are not forced to leave.*

## ANNEX A

### New Bill on Tender Offers and Corporate Governance:

A new bill on tender offers and corporate governance currently is being discussed in the Chilean Congress (“Bill”). The Bill provides that, regarding certain transactions involving significant transfers of shares of an open corporation, the buyer must carry out a mandatory tender offer. In addition, the Bill amends existing laws on corporate governance, introducing further protection to minority shareholders of open corporations.

The Bill establishes the following protections for minority shareholders:

1. Provisions regarding tender offers:

- (a) The following purchases of shares of an open corporation must be carried out through mandatory tender offers to all of the shareholders:
  - i) Purchases that allow the purchaser to control 30% or more of the corporation’s shares;
  - ii) Purchases that allow a shareholder who already controls 30% or more of the corporation’s shares to control up to 50% of the shares; and
  - iii) Purchases that allow the purchaser to control 75% or more of the corporation’s shares or of a specific class of shares. In the case of this subsection (iii), the purchaser also must carry out a tender offer for the remaining shares no later than 30 days after the initial purchase. The price for this additional tender offer cannot be less than the price offered to shareholders exercising dissenters’ rights.
- (b) Purchasers that acquire 30% or more of an open corporation’s shares from a majority controlling shareholder are not required to carry out the purchase through a tender offer. However, the purchaser must carry out a tender offer for an additional 20% of the remaining shares.

These mandatory tender offers provide further protection to minority shareholders. According to the Bill, there can be no discrimination in price between minority and majority shareholders. In addition, the tender of shares is entitled to the highest price paid by the offeror from 90 days prior to the date of the offer to 120 days after the offer. The offer may not be revoked, notwithstanding the stipulation of expiration clauses. The tender, on the other hand, may be withdrawn at any time while the offer stands. Moreover, minority shareholders may exercise dissenters’ rights (mandatory redemption), if the result of the tender offer is to convert the company into a closed corporation. In this case, shareholders exercising this right must receive per share the same price paid in the tender offer.

Corporations whose shares are being subject to a tender offer may not undertake material changes in corporate or financial structure (*i.e.*, merger, spin-off, early dissolution, or transfer of over 5% of its assets). In addition, the board of directors must issue a report advising shareholders on the pros and cons of accepting the tender offer.

2. Provisions regarding takeover:

- (a) Existing disclosure obligations regarding takeover of an open corporation are reinforced.
- (b) New disclosure obligations are imposed on shareholders holding 15% or more of an open corporation's shares who purchase an additional 3% of the shares in any given year, provided that the ultimate goal is the takeover of the company.
- (c) Controlling shareholders also must disclose information whenever they sell their interest in an open corporation.

Information on takeovers must be disclosed to the SVS, the Chilean stock exchanges, and the shareholders. The Bill establishes the procedure for disclosure and the applicable sanctions if this procedure is not followed.

3. Provisions regarding preferred stock:

Regarding shares that grant control privileges over an open corporation, the privileges may last only five years. This term may be renewed by a special shareholders meeting.

4. Provisions regarding management of a company:

- (a) Regarding related party transactions involving directors, if it is not possible to determine whether the transaction was at market value ("arm's length"), two independent opinions must be requested.
- (b) The following open corporations must have an auditing committee:
  - i) Corporations in which the controlling shareholder holds less than 75% of the voting shares;
  - ii) Corporations having at least one institutional investor<sup>15</sup> holding at least 5% of the company's shares; and

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<sup>15</sup> Under the Securities Market Law, the following foreign entities currently might be considered to be "institutional investors:" foreign banks, foreign financial companies, foreign insurance companies authorized by law to act as an insurance company in Chile, foreign pension fund management companies authorized by law to act as a pension fund management company in Chile, and other foreign entities specifically determined by general rule of the Superintendent of Securities and Insurance to be an institutional investor because their principal activity is to carry out financial investments and to invest in financial assets with funds pertaining to third parties, and if according to the volume of their transactions, the nature of their assets, or other elements, their participation in the market is deemed relevant.

iii) Corporations that have net assets of 1,500,000 *Unidades de Fomento*.<sup>16</sup>

These corporations must have seven instead of five directors. The auditing committee must be formed by three directors, the majority of which must be independent from the controlling shareholders. The auditing committee will be able to supervise, among other things, the company's financial statements, risk assessment, and affiliated transactions.

5. Provisions regarding supermajority issues:

- (a) The law currently in force provides that a two-thirds supermajority is required in order to approve the transfer of the assets and liabilities of a company or all of the assets of a company. According to the Bill, a supermajority would be required for the transfer of 50% or more of the assets (whether or not it includes liabilities), or for the implementation or amendment of any business plan that involves such a transfer.
- (b) A two-thirds supermajority would be required in two additional cases:
  - i) the granting of security interests in favor of third parties that involve 50% or more of the company's assets, except in the case of subsidiaries (in which case the board of directors' approval shall suffice); and
  - ii) the purchase of shares issued by the purchasing corporation, when the purpose of the purchase is to comply with an agreement reached at a special shareholders meeting.

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<sup>16</sup> The Unidad de Fomento is a daily indexed, Chilean peso-denominated accounting unit designed to discount the effect of Chilean inflation and is based on the previous month's inflation rate as officially determined. As of July 14, 2000, 1.5 million Unidades de Fomento would be approximately US \$50,000.





Latin  
America

Africa

# Mexico

This memorandum was prepared based upon information received from Creel, García-Cuéllar y Müggenburg, Mexico. The information contained herein is current as of July 1, 2000.

## I. Rights of Shareholders<sup>1</sup>

### A. Share Ownership

Generally, shares of Mexican corporations have equal value and confer equal rights to their holders. Notwithstanding the foregoing, companies may issue more than one series of shares, in which case, shares of different series may grant different rights, provided that all series of shares are entitled to participate in the profits of the corporation. Any provision that excludes a shareholder or a series of shares from the profits of the corporation is null and void.

Exceptions to the general rule are as follows:

- (i) Under The Mexican General Law on Commercial Companies (*Ley General de Sociedades Mercantiles*) (“LGSM”), a federal statute that governs public and private corporations incorporated in Mexico, corporations may issue a different class of shares with special rights and obligations as described in the corporate by-laws;
- (ii) Public corporations may issue shares with no voting rights;
- (iii) Under The Mexican Foreign Investment Law (*Ley de Inversiones Extranjeras*) (“LIE”), which governs public and private Mexican corporations that have shares placed with foreign investors, corporations may issue “neutral” shares granting limited or no voting rights to Mexican and foreign investors. This type of share is issued by corporations that have percentage restrictions on the participation of foreign investors and enables foreigners to exceed the limits by acquiring neutral shares, which are not computed as a foreign investment. Alternatively, public corporations may contribute those shares that only may be owned by Mexican investors to a trust in order for the trustee to issue Ordinary Certificates of Participation (“CPOs”), which may be owned by foreign investors. The underlying securities will be voted by the trustee as the other Mexican shares are voted. The holders of CPOs do not attend or vote at shareholders meetings;
- (iv) Corporations may issue preferred shares with limited voting rights that have a preferential right to collect dividends. In this case, ordinary shares may not collect dividends until a 5% dividend has been paid to the limited voting shares. Limited voting shares also have preferred rights over ordinary shares in the event of the dissolution of the corporation. Articles of incorporation also may provide that a higher dividend shall be payable to the limited voting shares as compared to the ordinary shares.

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<sup>1</sup> Information in this section is based principally on the Mexican General Law on Commercial Companies (*Ley General de Sociedades Mercantiles*), the Mexican Securities Market Law (*Ley del Mercado de Valores*), and the Mexican Foreign Investment Law (*Ley de Inversiones Extranjeras*).

The limited voting shares shall have the right to vote only at extraordinary shareholders meetings to approve resolutions on matters related to the duration, premature dissolution, change of corporate purposes, nationality and transformation of the company, and merger or spin-off of the company;

- (v) The by-laws may provide for the issuance of shares in favor of those persons who render their services to the company, which normally are known as “labor” shares. The by-laws shall establish the terms and conditions of the labor shares;
- (vi) As provided by the LGSM, the by-laws may establish that shares, during a period not exceeding three years from the date of their respective issuance, shall be entitled to receive a maximum interest rate of 9% per annum. This payment can be made even if the company does not have any profits; and
- (vii) When initiating the redemption of shares, corporations may issue “benefit” shares that are shares that are substituted for the redeemed shares. The benefit shares are entitled to receive dividends, but may not grant corporate rights and may not be part of the capital stock of the company.

## B. Voting Rights of Shareholders

Voting rights are established primarily by the LGSM. The by-laws may establish additional provisions than those established by the LGSM. Additionally, The Mexican Securities Market Law (*Ley del Mercado de Valores*) (“LMV”) and regulations (“Circulars”) issued by the Mexican Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores*) (“CNBV”) establish special rules for voting rights in public corporations.

There is generally a one share, one vote requirement and, as mentioned above, according to the LGSM, shares from the same series or class must have equal rights. Accordingly, different classes of shares may have different voting rights. As explained above, some classes of stock may have limited voting rights and therefore will only have the right to vote on certain matters. The LGSM does not permit the issuance of shares with unequal voting rights within a particular class.

Public companies may issue non-voting shares to be voted as a special class only at special shareholders meetings of such class, when the rights and obligations of such class are at issue. Also, public companies may issue shares with limited voting rights. The quorum requirement for a special meeting of non-voting shares is 75% of the outstanding shares of a class. If a quorum is not obtained at the first meeting, a quorum of 50% of the outstanding shares of a class must be present for a subsequent meeting. At such a meeting, decisions must be approved by a vote of at least 50% of the shares of the relevant class present at the meeting. There is no minimum ownership percentage required for shareholders to call for a meeting.

Cumulative voting is not allowed. A shareholder or group of shareholders holding 25% of the shares of a private company or 10% of the shares of a public company has the right to elect one director. The by-laws may establish additional rights for election of directors provided, however, that under no circumstances will a share be entitled to have more than one vote.



As a general rule, there are no limitations imposed on foreign investors to participate in Mexican corporations. However, the LIE does restrict foreign investment in certain activities that are deemed strategic or reserved to Mexican nationals. In such activities, foreign investors may not exceed a certain percentage ownership (i.e., 49%), which may be eliminated in some cases with the authorization of the National Commission of Foreign Investment. Furthermore, in accordance with the LIE, foreign investors only may participate in some reserved activities through the purchase of “neutral” shares with limited voting or non-voting rights. In the case of public companies, a trustee (Mexican banking institution) could acquire shares that only may be owned by Mexican investors and issue, in exchange, CPOs that may be acquired by foreign investors. The underlying shares will be voted by the trustee (not the CPO owners) in the same manner as other shares of the same class are voted. Even if there are certain limitations for the acquisition of shares by foreign investors, under the Mexican Constitution, foreign persons when permitted to own shares will be entitled to the same legal rights afforded to Mexican nationals.

## C. Shareholders Meetings

### 1. Record Date

Under the LMV, all shares of public corporations must be maintained by Indeval, an institution for the deposit of securities. Indeval provides for the custody, administration, compensation, liquidation, and transfer of securities issued by public corporations.

The practice of using record dates in order to be entitled to vote or receive a dividend is not recognized under Mexican law. The general rule is that shareholders must own shares on the date the shareholders meeting is held in order to vote. In other words, shareholders that at the time of the meeting evidence their status as shareholders may vote the shares. The LGSM and the LMV state that this may be proven by producing the share certificate and/or the corresponding registration in the company’s share registry. In the case of public corporations, the date of issuance of the certificate by Indeval is, in effect, the record date for the meeting. Indeval issues the certificate five working days before the shareholders meeting if the issuer is domiciled in Mexico City or eight working days if the issuer is domiciled in another city.

Shares of private corporations may be freely traded by the shareholders after notification of a shareholders meeting has been published and, in such case, a shareholder that acquires the shares and holds them on the date of the meeting is entitled to vote those shares. If a shareholders meeting is adjourned, the shareholders that will be entitled to vote the shares once the meeting is resumed will be those who prove their status as shareholders as described above.

Although the LGSM and the LMV do not provide for a record date or impose trading restrictions, there are certain rules governing the right to vote shares at a shareholders meeting:

- (i) The by-laws may provide that the share registry may be “closed” a certain number of days prior to the date the shareholders meeting is held. Consequently, any transfers of shares during that period of time will not be recorded. Thus the shareholder entitled to vote will be the shareholder recorded on the share registry, even if that shareholder has subsequently transferred the shares;

- (ii) In the case of public corporations, Indeval produces a certificate of the holdings of shares five or eight working days before the shareholders meeting is held. Transfers of shares after the certificate is issued are not permitted until the day after the shareholders meeting is held. If the meeting is adjourned for not more than three days at the request of shareholders representing at least 33% of the shares of a company, then trading is restricted until one day after the meeting is held. When trading is restricted after the date the certificate is issued, then the holder as of such date is the only one entitled to vote at that meeting.

## 2. Notice Requirements for Shareholders Meetings

Ordinary, extraordinary, or special shareholders meetings must be called by placing a notice in the Official Gazette of the domicile of the company and/or in one of the newspapers published in that domicile. Notices must be published in Spanish. The announcement must be made in advance of the meeting, as provided in the by-laws or, if the by-laws do not provide for the number of days in advance, then the notice has to be published at least 15 days before the date set for the meeting. Notices convening shareholders meetings must contain the entire agenda, the date, and the exact location where the meeting is to be held. Notices must be signed by the person calling the meeting. In the case of public corporations, a copy of the notice must be delivered to the CNBV and to the Mexican Stock Exchange (*Bolsa Mexicana de Valores*) (“Bolsa”). The Bolsa makes the notice public through a daily publication and through other electronic means. In the case of private corporations, the by-laws may provide that shareholders of record receive the notice by mail within a certain number of days prior to the meeting. A shareholders meeting for private corporations may be held without prior notice only if, at the time of the meeting, the total number of all outstanding shares is duly represented.

Generally, a shareholders meeting only may approve resolutions on items included in the published agenda. Only if all shares at the time the meeting is held are represented at the meeting may an item not included in the agenda be added and voted on. Otherwise, if a resolution is adopted with regard to an item not mentioned in the agenda, the resolution is null and void.

The LGSM and the LMV do not impose special notice requirements upon companies whose shares are traded outside of Mexico, such as American Depositary Receipts (“ADRs”) or Global Depositary Receipts (“GDRs”). However, the CNBV and the Bolsa require that companies that have shares traded outside of Mexico must publish in Mexico any notices published outside of Mexico.

## 3. Shareholder Proposals

A shareholder may not require that a proposal be included on the agenda for a shareholders meeting. However, shareholders representing not less than 33% of the shares of a company may request in writing to the board of directors or the statutory auditors that a shareholders meeting, either ordinary or extraordinary, be called to deal with the matters expressed in the written request. Otherwise, the owner of one or more shares may request in writing to the board of directors that an ordinary shareholders meeting be called only if (i) no shareholders meeting has been held for the past two consecutive fiscal years or (ii) the meetings held during such time have not discussed the financial annual reports of the company and/or the appointments of the board of directors or the statutory auditors. Notwithstanding the above, any

shareholder may send a written request to the statutory auditor asking him to investigate a given issue and, if certain irregularities are found, to call a shareholders meeting to report his findings.

Only shareholders that own the required minimum percentage of shares (25% of the shares of a private company and 10% of the shares of a public) may propose to appoint or remove directors. The final appointment or removal of a director is determined by shareholder vote at an ordinary shareholders meeting.

The form of a shareholder's ownership does not affect the shareholder's right to request a shareholders meeting. However, the holders of ADRs, GDRs, or CPOs do not have any direct right to request a shareholders meeting. These holders may direct a petition to the depositary of the underlying securities.

#### 4. Proof of Shareholder Status

Shares of public companies must be deposited with Indeval by the securities broker who acts on behalf of clients. Indeval will then issue a certificate identifying the different brokers holding shares. In turn, each broker is required to identify each client for whom it holds shares by delivering to the issuer both the certificate and the list produced by the broker. Such evidence will be sufficient to prove shareholder status.

Shares must always be nominative (registered), meaning that the shareholder's name must be identified on the physical certificate and/or listed on the company's share registry. Companies may not issue bearer shares; *i.e.*, shares that do not identify the owner. Additionally, corporations must maintain a share registry that will identify the name, nationality, and the number of shares owned by such shareholder. Any transfer of shares must be recorded in such registry. In the case of most public corporations, Indeval maintains the share registry. The company will rely on the share registry to identify its shareholders. In the case of public corporations, the shareholders do not hold physical possession of the shares. Instead, the certificate issued by Indeval will be sufficient evidence of ownership of shares.

The shares can be held by a nominee, such as a brokerage firm or a custodian, but in order to vote in shareholders meetings, a proxy issued by the nominee will be required for the beneficial shareholder<sup>2</sup> to attend and vote. In the case of public corporations, the certificate issued by Indeval and the list prepared by the securities broker are sufficient to permit a shareholder to vote its shares. If a custodian holds shares in an omnibus account, the custodian must issue proxies to each of the different beneficial shareholders, so that they may attend and vote the shares at a meeting. A custodian or other nominee also may vote shares held for beneficial shareholders and may vote some shares held for beneficial shareholders in favor of a proposal and other shares held for beneficial shareholders against the same proposal.

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2 A "beneficial owner" is the owner of a security registered in another's name (such as in the name of a broker).

## 5. Attendance at Shareholders Meetings

A company's by-laws cannot restrict the attendance of shareholders at any shareholders meeting, although certain classes of shares only may attend certain shareholders meetings.

Only the record owner (which may be a custodian or a brokerage firm) of the shares may attend (whether directly or by proxy) a shareholders meeting and vote the shares. The record owner may attend directly or may designate an attorney-in-fact or a proxy to attend the corresponding meeting and vote. With regard to public corporations, the record owner is the securities firm that deposits the shares with Indeval. The securities firm issues a list of clients who own the shares held by such firm for the account of its clients. The securities firm is the record owner of the shares and may attend the shareholders meetings and vote accordingly.

A beneficial owner may attend a shareholders meeting and vote the shares if the record owner issues a proxy in the beneficial owner's name. In principal, the beneficial owner's name must be recorded in the registry of the company in order for the owner to attend the meeting on its own behalf and/or vote the shares. In the case of public corporations, it is not necessary for a proxy to be issued by the record owner (brokerage firm) in order for beneficial owners to attend shareholders meetings.

In private corporations, the by-laws may establish that a shareholder, in order to attend a shareholders meeting, must:

- (i) be the owner of record registered in the share registry; and/or
- (ii) physically present a share certificate or evidence of deposit with a financial institution in Mexico or abroad.

There is no requirement that the documents be notarized, authenticated, or consularized. All documents must be issued in Spanish or, if they are issued in another language, they must be accompanied by a Spanish translation.

For a representative of a legal entity, such as a corporation, to attend a shareholders meeting, it is necessary to have a proxy letter, which, unless otherwise provided in a corporation's bylaws, must be in writing and signed by the representative of the corporation before two witnesses. The proxy letter must be in Spanish or translated into Spanish.

Shareholders are permitted to ask questions at the meeting. A shareholder is not prohibited from bringing a translator to a shareholders meeting. The person chairing the meeting may refuse to respond to questions when the topic is not related to issues included on the agenda. Shareholders holding 33% or more of the shares of a company may present a motion to suspend the shareholders meeting for up to three days, on the grounds that they do not have the information required to vote their shares. The meeting will resume after the three days have elapsed.



## 6. Proxy Voting

Shareholders have the right to attend shareholders meetings directly or be represented at them by proxy. Shares may be voted by any representative to whom voting authority is delegated, provided that members of the board of directors and the statutory auditors are not, under any circumstance, designated as proxies. The vote must always be given by either the shareholder, the shareholder's delegate, or the custodian (if applicable) by attending the meeting in person and not by submitting a written proxy. The LGSM and the LMV do not have a procedure to cast votes by submitting a written proxy.

Foreign investors do not need to be represented by a local attorney in order to vote at a meeting either in person or by proxy. The form of designating proxies should be established in the by-laws of the company. If the by-laws do not establish such terms, the LGSM provides that all proxies must be evidenced in a written document (usually a proxy letter) signed by the shareholder before two witnesses. The proxy must be in Spanish and, when drafted in a foreign language, a Spanish translation is required. The requirements for designating proxies and voting through proxies is applicable to both Mexican and foreign shareholders. The shareholder also may grant a general power of attorney to his representative before a public notary.

A corporate shareholder may grant a general power of attorney to a representative to vote at all shareholders meetings for the corporate shareholder. The power of attorney must be signed before a notary public, and the notary's signature must be certified and "apostilled" by the authority of the state of incorporation of the corporate shareholder.

Proxies may vote on behalf of one or more shareholders. Likewise, proxies acting on behalf of more than one shareholder may vote shares in favor of a proposal on behalf of one shareholder and against that same proposal on behalf of another shareholder.

## 7. Quorum

Under the LGSM, shareholders meetings are classified as either ordinary, extraordinary, or special meetings. In order to approve certain matters (such as a change to the company by-laws, merger, redemption of shares by the company, dissolution of the company), an extraordinary meeting must be convened. All other meetings are ordinary except when a meeting is called to adopt resolutions for a class of shares, in which case the meeting is special. The matters that require an extraordinary meeting are listed in the LGSM, but may be expanded upon by including additional matters in the issuer's by-laws.

For an ordinary shareholders meeting to be held legally, at least one-half of the capital stock must be represented at the meeting. If it is not possible to hold an ordinary shareholders meeting for lack of a quorum, the meeting shall be adjourned and a second meeting called. At the second meeting, no quorum is required. An extraordinary or special shareholders meeting may be held legally when at least 75% of the shares of the company is represented at the meeting. In the case of an extraordinary or special shareholders meeting, the presence of at least 50% of the shares of the company is required to have a quorum as a result of a second or subsequent meeting.

## 8. Voting and Supermajority Provisions

Shareholders vote their shares by attending the meeting in person or by designating a proxy to attend the meeting. Shares always are voted by attendance and not by sending a written proxy to the corporation. Only the shares that are duly represented at the shareholders meetings may be voted. The general rule for voting is one vote per share. There is no minimum ownership percentage required for shareholders to call for a vote at the meeting.

In ordinary shareholders meetings, resolutions adopted are valid only when approved by a majority of votes of shares present at the meeting. In extraordinary or special shareholders meetings, resolutions adopted are valid legally when approved by a vote of shareholders representing at least 50% of the shares of the company. If it is not possible to hold an ordinary shareholders meeting for lack of a quorum on the fixed date, a second meeting shall be called and resolutions will be adopted by a majority vote of the shares represented at the meeting.

The by-laws of a company may establish supermajority requirements in order to adopt resolutions regarding specific issues. There are supermajority requirements established by law for specific measures that must be adopted at an extraordinary shareholders meeting. For example, in order to amend provisions in the by-laws of a public corporation regarding delisting, a vote of at least 95% of the shares of the company is required.

## 9. Voting Tabulation and Results of Shareholders Meetings

As described above, the rule for voting under Mexican law is one vote per share. There are no specific provisions under Mexican law governing the counting of votes; however, the by-laws of the company may establish specific rules for such purpose. In general practice, the form of counting votes normally is carried out by a simple show of hands of the shareholders or proxies who are present at the meeting. Formal counting may be required by the person presiding over the meeting or at the request of a majority of the shareholders or the proxies present at the meeting.

Management of the company is not required to tabulate the votes. Any shareholder may propose a motion to call for a tabulation. The motion must be approved by a majority vote of shareholders or proxies present at the meeting. The nationality of a shareholder is not relevant and does not change the rights of a shareholder. Foreign shareholders are entitled to the same rights as Mexican investors.

In a shareholders meeting, a “teller” (*escrutador*) must be appointed to prepare the attendance list and to count the votes cast to approve resolutions. The teller is usually a shareholder attending the meeting. The teller prepares an attendance list that is signed by the shareholders or proxies attending the meeting. Under LGSM, there is no independent verification of the vote; however, a company’s by-laws may establish specific rules in this respect.

Minutes of the meeting always must be prepared, read, and approved before the meeting is adjourned. Shareholders have the right to request access to the minutes of the meeting, and therefore such minutes of the meeting always must be available to the shareholders. There

are specific provisions regarding the right to have access to a company's minutes that contain the results of votes cast at a shareholders meeting. Although not customary, the by-laws of the company may establish rules governing the right to have access to the minutes of a meeting. Generally, other company records are not available to shareholders with the exception of annual or quarterly financial statements. For public corporations, a copy of the minutes must be delivered to the CNBV and the Bolsa. An extract of the minutes is published in the daily publications issued by the Bolsa.

#### **D. Rights of Minority Shareholders in Corporate Transactions<sup>3</sup>**

Under no circumstances may an issuer restrict the rights of a shareholder, including minority shareholders.

Issues regarding a merger, takeover, recapitalization, or other transactions that may affect shareholder rights or the value of shares, such as the purpose, duration, nationality of the company, or any amendments to the by-laws, must be approved by shareholders at an extraordinary meeting, which requires a higher quorum and a higher percentage of votes to adopt a resolution, as discussed above.

In addition to the foregoing, the LGSM sets forth other specific rights of minority shareholders:

- (a) Whenever the extraordinary meeting adopts resolutions with regard to a change of purpose, nationality, spin-off and/or transformation of the company, any shareholder who voted against a resolution shall have the right to withdraw from the company and to be reimbursed for the redemption of its shares, in proportion to the net worth of the company as shown on the last balance sheet. The shareholder must make this request within 15 days after the date on which the meeting adjourns.
- (b) Shareholders representing 33% of the shares of a company may oppose in court the resolutions adopted at shareholders meetings, provided that (i) a suit is initiated within 15 days after the date on which the meeting adjourned; (ii) the plaintiffs either did not attend the meeting or voted against the resolution; and (iii) the complaint specifies the provision of the by-laws or the statute breached.
- (c) The by-laws shall determine the rights of the minority shareholders to designate directors and statutory auditors; however, minority shareholders representing 25% of the shares of a private company and 10% of the shares of a public company shall appoint at least one director or statutory auditor.

Under Mexican law, a shareholder's shares generally are not subject to mandatory redemption or sale. Notwithstanding the above, at an extraordinary meeting, shareholders holding 50% of the shares of a company may approve a capital reduction by redeeming shares. The shares to be redeemed are selected by lottery. Shares redeemed are paid at book value and at the same price.

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<sup>3</sup> Information in this section is based in part on the Mexican General Law on Commercial Companies.

As described above, in a limited number of cases, shareholders that object to actions taken by a majority shareholder or management in a corporate transaction will have the right to withdraw and to receive the book value of its shares. Under Mexican law there is no right for a shareholder to have its shares judicially appraised.

## E. Transferability of Shares

Generally, shareholders may transfer their shares freely. Notwithstanding this, the by-laws of a private corporation may establish restrictions on transferability, such as requiring an approval from the board of directors or the right of first refusal when another shareholder is transferring shares. If the board of directors does not approve the transfer, the same board shall designate a buyer who will have to pay the same price for the shares. Shareholders in a public corporation have no restrictions on the transfer of their shares provided, however, that when a shareholder has insider and/or privileged information, the shareholder may not transfer shares until that information is made publicly available.

The LGSM provides that shareholders shall have the right of first refusal to subscribe to shares issued in the event of an increase of capital, in proportion to the number of shares they hold. This right must be exercised within 15 days after the date of publication of the resolution of the shareholders meeting to increase the corporate capital in the Official Gazette of the company's domicile. These provisions apply equally to Mexican and foreign shareholders.

Notwithstanding the foregoing, shareholders may accept, under contract, certain limitations on transferability. Typically, shareholders accept by contract rights of first refusal or first offer. Shareholders also may accept limitations to sell their shares to competitors, provided that any such restriction is for a short time period.

## F. Accounting

The statutory auditors have direct access to the books and records of the company. They can demand from the board of directors a monthly report including at least a statement of the financial situation and a statement of results of the company. Statutory auditors can carry out inspections on the operations, documentation, records, and other supporting evidence, to the extent necessary to perform the audit of the company. Shareholders holding 33% or more of the shares of a company may request that the statutory auditors conduct certain inspections. The statutory auditor must submit a report at the annual shareholders meeting.

All shareholders are entitled to receive periodic reports on the financial situation of the company. Likewise, shareholders must receive year-end financial statements, generally audited, which must be available for review during the 15-day period prior to the annual shareholders meeting called to approve such financial statements. In the case of public corporations, they also must furnish their financial information to the Bolsa, on a quarterly basis, and such information must be published by the Bolsa.

## G. Inspection Rights

If a shareholder does not have the minimum percentage ownership to designate a statutory auditor — *i.e.*, 10% of the shares of a public company or 25% of the shares of a private company — such shareholder will not have direct access to the books and records of the company. Notwithstanding the above, such shareholder is entitled to receive annual audited financial information, which, in the case of public corporations, is published. Moreover, any shareholder must be given access to inspect the company's share registry, the minutes of shareholders meetings, and, in certain limited circumstances, the minutes of board of directors meetings, audited financial statements, the company's articles of incorporation, and by-laws. In the case of public corporations, the shareholders also are entitled to inspect the quarterly non-audited financial statements. Shareholders do not incur any charges in making these types of inspections.

## II. Payment of Dividends

Dividend distributions are discretionary. Payment of dividends must be approved by a resolution at a shareholders meeting. Shareholders may delegate the determination of the dividend's date of payment to the board of directors. The payment of dividends is made in exchange for a coupon, which is attached to the share certificate. From the dividend's date of declaration to the date of payment, the shareholder may sell the share certificate with or without the coupon. Whoever retains the coupon will collect the dividend.

Public corporations must announce publicly the payment of a dividend in a newspaper indicating the amount and date of payment and the reference to the number of the coupon that is to be used to collect the dividend. Copies of the announcement are delivered to the Bolsa, the CNBV, and Indeval. In the case of private corporations, a notice needs to be sent by mail to the shareholders of record that did not attend the meeting that approved the payment of dividends. Dividends are paid in cash at the corporate headquarters. For public corporations, the funds are transferred to Indeval for the payment of dividends. Dividends are paid in local currency only. Different dividend payments and dividend payment schedules are not permitted for minority and majority shareholders or for domestic and foreign shareholders.

If a class of shares is entitled to a preferred dividend, cumulative dividends are permitted. Under the LGSM, a certain class of limited voting shares is entitled to cumulative dividends. The by-laws also may provide for other classes of shares with different dividends. Such classes of shares are entitled to collect past-due dividends before common-stock dividends can be paid.

## III. Affiliated Transactions

Under Mexican law, there are no restrictions on transactions by a company with its affiliates. Notwithstanding this, the LGSM provides that a director or a shareholder must disclose if he has interests that conflict with those of the company in any business transaction and must refrain from participating in the corresponding deliberation and decision of that transaction.

There are no restrictions on the ability of an officer, director, or an employee of a company to own more than a certain percentage of shares. Notwithstanding this, there are certain highly regulated sectors that have limitations on the amount of shares any shareholder, including officers, directors, or employees of a company, may own, such as banks or securities brokerage firms.

There is a general prohibition against a company placing or offering its shares for a price below their par value. The company may issue shares that express no par value, which are issued at a subscription price that may be below market value. Additionally, if the by-laws so provide, the company also may issue a special class of shares that only may be acquired by the employees of the company, which may have a different subscription price and certain restrictions on transferability. In practice, shares offered to officers, directors, or employees may be sold at a price lower than the current market price. In the case of shares acquired below market value, the acquirer may be taxed on the difference between market price and purchase price.

## IV. The Role of Local Regulators and Stock Exchanges in Enforcing Shareholder Rights

### A. Responsibility of the Board of Directors

Under the LGSM, the board of directors of a company has fiduciary duties to the company and to all of its shareholders. The directors, once appointed, do not simply represent or act for the benefit of the group of shareholders that elected them. Rather, the fiduciary duties are to all of the shareholders of the company and to the company itself. At all times the board of directors must pursue the best interests of the company. In addition, the Code for the Improvement of Corporate Practices (*Código de Mejores Prácticas*) (“CMP”) has established certain specific duties of the directors, such as disclosure of necessary information, confidentiality, specific audit committee responsibilities, appointment of independent directors, and implementation of systems for internal control.

The liability of directors can be determined at a shareholders meeting. A director must relinquish his office immediately once the shareholders have found him liable at a shareholders meeting. Shareholders representing at least 33% of the shares of a company may bring directly an action for civil liability against the directors. Any director that is absent at a meeting or votes against the approval of a resolution will not be held liable for such action. Directors, once found liable and removed from office, only may be appointed again if the judicial authorities determine that the action brought against them was unfounded.

In practice, directors have not been held personally liable for breach of fiduciary duty. Notwithstanding this, directors have been held personally liable for criminal offenses, such as fraud and breach of certain security market regulations.

### B. Enforcement of Rights by Local Regulators

Although the LGSM sets forth the principle of the protection of shareholders rights, it does not require that regulators protect the rights of shareholders. The LGSM does not identify a specific agency in charge of enforcing such rights. In addition, the CMP has established specific provisions with the objective of protecting shareholders rights. The CMP provides rules for better communication between the board of directors and shareholders, and rules for disclosing relevant information to shareholders at shareholders meetings. The LMV also provides that regulators have the obligation of protecting the rights of investors in public corporations. Under the LMV, the CNBV is the agency entrusted with the obligation to enforce shareholders rights and plays an active role in enforcing shareholders rights. In addition, the Bolsa plays an active role in overseeing shareholders rights, although it has limited enforcement powers.

The CNBV has the authority to impose penalties on issuers in the case of breach of market regulations that protect shareholders rights. The CNBV may initiate actions against issuers or securities firms in the event of criminal offenses. The CNBV recently has become more active in utilizing its enforcement authority than it has in the past. The Bolsa may suspend trading of a listed share and obligate the issuer to disclose publicly the circumstances of the event. In certain extreme cases, the Bolsa could, with the authorization of the CNBV, cancel the listing of shares.

### C. Enforcement of Rights through the Judicial System

The LGSM contains substantial provisions on shareholders rights. Shareholders may seek redress through the judicial system for the violation of rights of shareholders. There is no requirement that the shareholder exhaust any remedies with the issuer first. From a practical point of view, enforcement of rights through the judicial system is time-consuming and expensive. Consequently, shareholders generally do not initiate legal actions. More recently, shareholders have taken a more active role and are starting to file claims in court. In general, minority and foreign shareholders are treated fairly in the judicial system. Derivative action lawsuits cannot be brought in Mexico.

Under corporate law, the general principle is that resolutions legally adopted by a majority vote at a shareholders meeting are imposed on absent and dissident shareholders. Notwithstanding this, shareholders holding at least 33% of the shares of a company may oppose in court resolutions adopted at ordinary shareholders meetings that breach the law or the by-laws. In this event, the resolutions being contested in court may be suspended if the plaintiff places a bond to guarantee payment of damages.

In the case of resolutions adopted by the board of directors, shareholders (whether Mexican or foreign) may cause a shareholders meeting to be convened to discuss the responsibilities of directors. Shareholders who represent at least 33% of the shares of a company may directly institute proceedings for civil damages against the directors, as long as the following requirements are satisfied: (i) such claims include all damages in favor of the company and not only those relating to the personal interest of such shareholders; and (ii) that such shareholders did not concur in the decision taken by the general assembly of shareholders not to take action against the directors, if such was the case. Any recovery that is obtained as a result of such claims shall be received by the company. Any shareholder, regardless of his percentage ownership of the stock, also may file a claim in court if his rights to vote, attend meetings, receive dividends or liquidation quotas, or other distributions are breached. In the case of ADRs and GDRs, the ADR and GDR holders have no direct rights against the issuer because the depositary is the shareholder of record and is entitled to seek the corresponding remedies.

### V. Financial Information and Auditors

In accordance with the LGSM, the board of directors of both public and private companies must present an annual report at the annual shareholders meeting. At a minimum, the report must discuss: (i) the progress of the company during the past fiscal year, as well as the policies followed by the directors and, as the case may be, the principal projects of the company; (ii) the principal accounting policies and criteria and an explanation of the information used to prepare the financial information contained in the report; (iii) the financial situation of the company at the closing date of the fiscal year; (iv) the financial results of the company during the fiscal year; (v) the changes in the financial situation during the fiscal year; (vi) the changes in the capital of the company during the fiscal year; and (vii) any notes necessary

to complete or clarify the information contained in the above discussion. Additionally, the statutory auditors must present an annual report to the shareholders with respect to the veracity, sufficiency, and rationality of the information presented in the board of directors report. The report must be prepared and ready to be distributed to shareholders at least 15 days before the date of the meeting. The shareholders have the right to receive a copy of the report upon request. The reports are available only in Spanish; however, certain issuers also prepare their reports in English, especially if their shares also are traded as underlying securities in ADR programs abroad. The reports generally are available on a timely basis.

In the case of public companies, there are numerous regulations that govern the preparation and disclosure of financial information that must be prepared quarterly and annually. Such reports are delivered to the CNBV and the Bolsa. The Bolsa must report the financial information in a daily bulletin that is available to shareholders upon request. Issuers must publish their audited financial statements annually in a newspaper.

The regulations that impose standards on auditors require their independence from management. There are strict rules on the preparation of financial statements, which must be prepared in accordance with Mexican Accounting Principles. The Mexican Accounting Principles are substantially similar to those used in the United States, except that in Mexico the financial information must be adjusted for inflation. There are no rules that govern the selection, resignation, or termination of accountants; however, the by-laws may address these areas. When auditing the financial information, the accountants (outside auditors) must disclose problems to the shareholders but are not required to notify the regulators.

## **VI. Depositary Receipts/Nominee Rights**

The holders of depositary receipts (such as ADRs or GDRs) are not recognized in Mexico as the holders of the underlying securities in the depositary receipt programs, therefore, they cannot attend shareholders meetings. The depositary is the record holder of the underlying securities and may attend meetings and exercise all rights pertaining to the shares. The depositary may designate the ADR holders as its proxy to attend and/or vote at a shareholders meeting. Accordingly, ADR or GDR holders may attend and vote at meetings, if the ADR depositary grants a proxy to the holders of the ADRs.

Furthermore, if the ADR or GDR holders have the right to exchange ADRs or GDRs for underlying shares, then they will become the owners of record and could attend meetings and vote. The shares must first be removed from the depositary receipt program in order for the shareholders to attend meetings and vote. Once the shares are removed, the ADR or GDR holder must either hold the share certificates or deposit the shares with a financial institution in Mexico or abroad, at which time the ADR or GDR holder becomes the shareholder of record.



## VII. Corporate Governance Code

Recently, the Corporate Practices Improvement Committee, which includes participants from the public sector, the Central Bank, the CNBV, and other government agencies, issued the Code for Improvement of Corporate Practices (“Código de Mejores Practicas” or “CMP”). The CMP sets forth principles aimed to improve the management and governance of Mexican companies. The CMP seeks to: (i) provide additional and more specific information on the management structure of companies; (ii) ensure disclosure of adequate financial information; (iii) establish procedures for enhanced communication among directors; and (iv) provide rules for disclosure of relevant information to shareholders.

On October 14, 1999, the CNBV issued a circular requiring that public companies publish reports on compliance with the principles set forth by the CMP.



Latin  
America

Africa

# South Africa

This Memorandum was prepared based on information provided by Bowman Gilfillan Inc. of Johannesburg, South Africa, and addresses the law and general corporate practices of South African public listed companies. The information is current as of July 1, 2000.

In South Africa, a company that is public and listed on the Johannesburg Stock Exchange (“JSE”) must comply with the JSE Listing Requirements Handbook (“JSE Listing Requirements”), as well as the Securities Regulation Code on Takeovers and Mergers (“SR Code”). Like any other company incorporated in South Africa, it also is regulated by the Companies Act 61 of 1973 (“Act”). Furthermore, a company’s constitutional documents, the Memorandum of Association (“Memorandum”) and Articles of Association (“Articles”) also would need to comply with the Act and the JSE Listing Requirements.

## I. Rights of Shareholders<sup>1</sup>

### A. Share Ownership

A company may divide its share capital into preference shares and ordinary shares, with or without a par value. Different classes of shares can have different rights to vote, capital distribution, and dividends.

### B. Voting Rights of Shareholders

Only a registered shareholder can attend and vote at shareholders meetings. The general rule is that one share equals one vote. If the share capital is divided into shares of par value, the shareholder’s votes must bear the same proportion to the total votes in the company as the nominal value of its shares bears to the nominal value of all the shares issued by the company. If the share capital is divided into shares of no par value, a shareholder must receive one vote for each share. Shares of the same class must have equivalent voting rights, although the voting rights of any particular class could be altered by a special resolution of the shareholders. The Act does not permit cumulative voting.

Non-voting preference shares acquire the right to vote when a preference dividend, or any redemption payment thereon, is late and also when any resolution is proposed that directly affects the rights or interests of these holders, including a resolution to dissolve the company or reduce its capital. The quorum requirements for a meeting of non-voting preference shares are the same as the requirements for a general meeting of shareholders. See Section I.C.7. below. There are no provisions of the JSE regarding the ability of preference shares to call a meeting as a class. The shareholding requirements to call a general meeting are set forth in Section I.C.3. below.

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<sup>1</sup> Information in this section is based principally on the Act (Companies Act 61 of 1973) and the JSE Listing Requirements.

Generally, foreign investors are not treated differently from local investors. However, there are limits on foreign investment in the civil aviation and broadcasting industries.<sup>2</sup>

When a foreign investor purchases shares in South Africa, the certificates must be endorsed as “non-resident.” This permits the foreign investor to remit proceeds from the subsequent transfer of those shares outside South Africa. In general, South African companies must obtain the approval of the South African Government to remit funds outside of South Africa for investment or other purposes.

## C. Shareholders Meetings

### 1. Record Date

Record dates are not used to determine eligibility to attend and vote at shareholders meetings; the registered owner of the shares on the books of the company is entitled to attend and vote at meetings. South African companies can elect to close their share register, with respect to all shares or a particular class, for a maximum of 60 days per year. South African companies typically close their share registers two days before a shareholders meeting. A company is required to give notice of its intention to close the share register in the Government Gazette and in a newspaper. The registered shareholder on the date the register is closed is the shareholder for the purposes of attending and voting at a shareholders meeting. A shareholder can sell shares during the closure period; however, the purchaser would not be recorded on the books of the company as the shareholder and could not attend or vote at the meeting.

### 2. Notice Requirements for Shareholders Meetings

A listed company must give notice of shareholders meetings to all shareholders entitled to attend those meetings (i.e., notice of a meeting of a particular class of shareholders would not be sent to shareholders of other classes of shares). Notice must be given at least 21 days in advance of the annual general meeting and at least 14 days in advance of other general meetings. At least 21 days’ notice must be given in advance of a general meeting where a special resolution is to be passed. A shorter notice period can be utilized only with the consent of the holders of at least 95% of the total voting rights.

The notice must be in writing and must state the time, date, and location of the meeting. The Articles govern the method for giving notice — it could be an advertisement, delivered personally, or mailed to the recipient’s registered address. If the shareholder’s registered address is not in South Africa, the Articles may require the shareholder to specify an address in South Africa for the purpose of receiving

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<sup>2</sup> *In the civil aviation industry, foreign investors cannot hold more than 25% of the voting rights of a company. In the broadcasting industry, foreign persons cannot have more than a 40% interest in, or otherwise exercise control over, a broadcasting signal distribution licensee; foreign persons also cannot have more than a 20% interest in a private broadcasting licensee, or otherwise exercise control over a commercial broadcasting licensee.*



notice. A notice given by advertisement also must be published in the Government Gazette. A notice is deemed to have been delivered by mail when the letter containing it is posted.

The inclusion of the agenda for a meeting in the notice generally is governed by the Articles. If the meeting will consider a special resolution, the Act requires the notice to include the terms of the resolution and also its purpose and effect. The Act does not specifically require that the notice for general meetings include the entire agenda of the meeting. However, South African Articles generally require that a certain amount of information about the meeting be included in the notice, so that a shareholder could decide whether or not to attend the meeting. South African case law suggests that where the Articles require that the general nature of special business is to be stated in the notice of the meeting, then no business can be transacted at that meeting that was not included in the notice.

There is no requirement that notice be given in a particular language; however, the JSE Listing Requirements require announcements to be made in English and, in certain circumstances, a circular would have to be published in a second official language.

There are no special notice requirements if a South African company takes affirmative action to qualify its shares for trading outside of South Africa. Anyone other than a holder of registered shares listed in a company's share register generally is not considered to be a "shareholder."

### 3. Shareholder Proposals

The Act specifies certain business that must be addressed at the annual general meeting and regulates other business that may take place at a general meeting. Any business can be raised by a shareholder for discussion at a general meeting, except possibly for the removal of a particular director or an auditor. Unless otherwise specified by the Articles, the Act requires 28 days' notice for a proposal to remove a director or auditor. Thus, a proposal for a vote to remove a director or auditor would have to have been in the notice of the meeting. Directors are not obliged to insert an item into the agenda at the request of shareholders.

Unless the Articles provide otherwise, the Act provides a procedure for shareholders to call a shareholders meeting or to request a shareholders meeting. Under the Act, two or more shareholders holding at least 10% of the issued share capital can call a general meeting of the company. Alternatively, either (i) 100 shareholders or (ii) a group of shareholders holding at least 5% of the issued share capital having a right to vote, can make a formal request to the company to convene a meeting. If this request is denied, 51 of the shareholders can call a meeting with 21 days notice; the meeting must be held within three months of the original request to the company for the meeting.

The Articles generally provide that the directors of a company are appointed by the shareholders in a general meeting. Unless the Articles provide otherwise, any shareholder can nominate a director for election to the board of directors; election to the position requires a majority vote of the shareholders.

#### 4. Proof of Shareholder Status

Only a shareholder duly registered in a company's share register on the date the register is closed can attend and vote at a shareholders meeting. Proof of identity is all that is required.

Where shares are held in the name of a nominee, only the registered shareholder can attend and vote at shareholders meetings. The name of the nominee is entered into the share register, not that of the beneficial owner.<sup>3</sup> However, the nominee/custodian would be expected to act in the interests of the beneficial owners it represents.

#### 5. Attendance at Shareholders Meetings

All registered shareholders are allowed to attend general meetings. With respect to meetings of a particular class of shares, attendance may be limited to the members of that class. Proof of identification generally is required to enter the meeting.

Meetings are conducted in English. Shareholders do not have the right to bring a translator. Shareholders are permitted to ask questions; in general, the chairman of the meeting invites questions from the shareholders and answers those questions.

#### 6. Proxy Voting

If authorized under the Articles, shareholders can vote by mail, but this is very unusual in South Africa. A shareholder can, however, issue a proxy (by mail) in favor of the chairman of the meeting and instruct him on how to vote.

A corporate shareholder can authorize an employee/officer to act as its representative at any shareholders meeting. This representative, who is not technically acting as a proxy, can vote both on a show of hands and during poll voting (see Section I.C.8. below). The representative should bring to the meeting evidence of a corporate resolution authorizing the representative to act on behalf of the company.

A shareholder can appoint anyone as a proxy to attend, speak, and vote in its place at any meeting of the company. The proxy actually would have to attend the meeting to vote. Unless the Articles provide otherwise, the Act prohibits the proxy from voting on a show of hands, and the proxy only can participate in a poll vote (see Section I.C.8. below). The exact format of the proxy and any other requirements for the proxy document would be specified in the Articles. The Articles may require the proxy document to be filed with the company prior to the meeting, but the Articles must allow them to be filed up to 48 hours before the meeting.

A shareholder can appoint more than one proxy to represent different interests, and each proxy can be instructed to vote differently. One proxy can represent an unlimited number of shareholders and can vote differently for each shareholder, according to their instructions. It is

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<sup>3</sup> A "beneficial owner" is the owner of a security registered in another's name (such as in the name of a broker).

not unusual for individual shareholders to appoint the chairman of the meeting as proxy. Nominees, including custodians and brokers, may represent the interests of a number of different persons and may vote some shares in favor of a proposal and other shares against the proposal. A nominee or custodian that is a registered shareholder also may delegate the right to vote to the beneficial owner of a security as proxy.

## 7. Quorum

Under the JSE Listing Requirements, the quorum for a general meeting must be at least three shareholders entitled to attend and vote. The Articles may stipulate a larger quorum. The quorum to vote on a special resolution is at least 25% of the total votes of all members entitled to vote, attending the meeting in person or by proxy. The quorum generally is determined by head count.

Any shareholder can demand an adjournment of a meeting. The chairman will put this request to a vote of the shareholders, who can approve the request by a majority vote. The meeting must be reconvened within seven to 21 days after the date of the original meeting. The Articles usually provide that where a meeting is adjourned on the grounds that the quorum was not met, those members present and entitled to vote at the adjourned meeting will be deemed to constitute a quorum.

## 8. Voting and Supermajority Provisions

The manner of voting generally is governed by the Articles, but the Act sets some limitations. Votes can be cast in person or by proxy.

If voting by a show of hands, a member has only one vote, regardless of the number of shares he holds or represents. Unless otherwise specified by the Articles, proxy representatives present at the meeting are not permitted to vote by show of hands.

Alternatively, a more formal “poll” vote may be used. A poll vote utilizes written votes that are placed into some form of ballot box. “Scrutineers” are appointed to examine and count the vote papers and to report the results to the chairman of the meeting. The chairman then announces the vote result to the meeting. In a poll vote, any shareholder or shareholder’s proxy is entitled to exercise all of its votes, but is not required to cast all the votes or to cast all the votes in the same way. Under the Act, a poll vote can be demanded by: (i) five shareholders having the right to vote; (ii) a shareholder or group of shareholders representing at least 10% of the issued shared capital; or (iii) a shareholder or group of shareholders representing at least 10% of the total number of voting shares. The Articles govern the timing and procedures to exercise the demand for a poll vote.

A resolution generally can be passed by a simple majority of the shareholders present and entitled to vote, if they constitute a quorum. However, the Act requires a special resolution for certain matters. On a vote by a show of hands, a special resolution must be passed by at least 75% of the shareholders entitled to vote. For a poll vote, the resolution must be passed by at least 75% of the total votes to which shareholders, present in person or by proxy, are entitled. Matters requiring a special resolution include: change of name; alteration of the objects and powers of the company; and the alteration of the Memorandum or the Articles. Special resolutions must be registered at the Registrar of Companies within one month of passage; the resolution becomes effective on the date of registration.



## 9. Voting Tabulation and Results of Shareholders Meetings

The method of counting votes, tabulation of votes, and verification of results is governed by the Articles.

The Act requires companies to record minutes of all proceedings, including vote results, during any shareholders meeting in an official language, which must be kept in a minute book. The minutes must be entered into the minute book within one month of the date of the meeting. The minute book must be kept at the company's head office and must be available for inspection by any shareholder. Shareholders also are entitled to a copy of the minutes of any general meeting within seven days of filing a request for it in writing.

### D. Rights of Minority Shareholders in Corporate Transactions<sup>4</sup>

South African company law generally is based on a principle of majority rule. As long as the majority acts lawfully, the courts generally will refuse to interfere in the conduct of a company's affairs at the request of a minority group. Unless otherwise specified by the Articles, mergers and acquisitions do not require a special resolution and can be adopted by a simple majority. However, there are certain statutory protections for minority shareholders.

Under the Act, any shareholder of a company can apply to a court for relief from an act or omission of the company that is unfairly prejudicial, unjust, or inequitable. A minority shareholder would have access to this relief regardless of the nature of the corporate transaction at issue.

Under the SR Code, a comparable offer must be made to all shareholders where a person or group of persons acquires 35% or more of a public company. In the very unusual situation where a shareholder or third-party obtains a court order to reorganize the company by selling shares to that shareholder or third-party (called an "arrangement"), 75% of the shareholders must approve the share transfer. In addition, under the Act, when an offer is made for 90% of all the securities of a company, or a particular class of shares, the minority shareholders can require the offeror to acquire the remaining 10% of shares. The offeror must acquire the minority shareholders' shares on terms that are comparable to the offer for the other shares; if the terms are disputed, the minority shareholders can apply to a court for a determination.

### E. Transferability of Shares

Under the JSE Listing Requirements, the Articles cannot contain any restriction on the transfer of securities. However, foreign investors only will be able to remit the proceeds from a sale of shares outside South Africa if the share certificates are endorsed "non-resident."

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<sup>4</sup> Information in this section is based principally on the Act and the SR Code.

## F. Accounting

A shareholder has no right to demand an accounting and also has no right to inspect the company records. Shareholders of public companies receive interim reports covering the first half of the financial year, provisional annual financial statements, and audited annual financial statements. Under the Act and the JSE Listing Requirements, a copy of the annual financial statements must be sent to the shareholders at least 21 days before the meeting at which they will be considered.

## G. Inspection Rights

Shareholders have the right to inspect a limited range of company documents. The Memorandum and Articles must be filed with the Registrar of Companies, where they are available for public inspection. A shareholder also can inspect the share register and a listing of the directors' interests in the company. As more fully described above, the minutes of all shareholders meetings are available to all of the shareholders.

## II. Payment of Dividends

The procedure for declaring dividends is regulated by the Articles. In general, dividends are declared by the shareholders in the general meeting, and the directors have the power to recommend the dividend amount. The shareholders can declare a dividend even without the recommendation from the directors, but the Articles may state that dividends cannot exceed the amount recommended by the directors. Unless the Articles provide otherwise, a company is under no obligation to declare a dividend.

Dividends can be paid in cash or in kind. There is no legal requirement that dividends must be declared in any specific way. Cumulative dividends are permitted.

The JSE Listing Requirements require a declaration of a dividend in advance of the payment of the dividend. Companies are authorized to close their share registers in advance of a dividend, but are required to announce the closure date in the Government Gazette and in a newspaper. In practice, companies issue a notice that a dividend has been declared, which also states the closure date of the share register and the intended date of payment of the dividend. The JSE Listing Requirements specify that there must be at least 14 days between the date of declaration of the dividend and the date of the closure of the share register. Shares can be traded while the share register is closed, but the purchaser is not a registered shareholder and is not entitled to the dividend.

Only the shareholders listed on the share register on the date the register is closed are entitled to receive dividends. The Articles can provide that unclaimed dividends become the property of the company after three years. South African companies only are authorized to pay dividends in South Africa in local currency.

### III. Affiliated Transactions<sup>5</sup>

The Act requires the annual financial statements of a company to state the amount and details of every loan made and every security interest given during the prior financial year. The annual financial statements also must give the balance of outstanding loans and security interests from prior years. The Act also requires companies to maintain a register of its directors' direct and indirect material interest in contracts that are important to the company's business.

A company can issue its shares to employees and directors, but is required to disclose this. If properly disclosed, a company can issue the shares to employees and directors at less than the current market price. Payments to directors for resigning, or in connection with an arrangement or takeover scheme, must be approved by the shareholders.

The JSE Listing Requirements define a "related party" to include: (i) shareholders holding at least 10% of the voting rights of a company; (ii) directors of a company, or any of its subsidiaries or holding companies; (iii) "advisors" of a company with a beneficial interest in the company; (iv) principal executive officers of a company; and (v) any associate of persons in (i) – (iv). The governing body of the JSE may require certain transactions by a company with a "related party" to be approved by a resolution of the shareholders.

## IV. The Role of Local Regulators and Stock Exchanges in Enforcing Shareholder Rights

### A. Responsibility of the Board of Directors

There is no body of law that requires the board of directors of a company to represent the interests of shareholders. Directors do, however, have a fiduciary duty towards the company. The Act places restrictions on the benefits that directors can receive, particularly with regard to resignation and merger/takeover transactions.

Directors have personal liability vis-à-vis the company they serve. Under the Act, the courts can hold any person who is knowingly a party to reckless or fraudulent conduct in the operation of a company's business responsible for all or any portion of the debt/liabilities incurred by the company.

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<sup>5</sup> Information in this section is based principally on the Act and the JSE Listing Requirements.

## B. Enforcement of Rights by Local Regulators

The general principal under South African law is non-interference in a company's affairs, but a shareholder does have some indirect protection.

The JSE has the power to investigate dealings in listed securities and violations of the listing requirements. It has the power to sanction listed companies, to suspend and/or terminate the listing of any security, and to issue a warning or a penalty.

The SR Code generally governs takeovers and mergers. The SR Code can be enforced by the Securities Regulation Panel through the courts by issuing orders for specific performance or to stop certain conduct. Shareholders who are affected in a merger or takeover have the right to lodge a complaint with the Securities Regulation Panel, but the Panel is not obligated to investigate or make further inquiries.

The Financial Services Board is responsible for the regulation of insider trading. It has the power to investigate matters relating to insider trading and to institute proceedings.

## C. Enforcement of Rights through the Judicial System

Under the Act, any shareholder can apply to a court for relief from an act or omission of a company that is unfairly prejudicial, unjust, or inequitable. A minority shareholder would have access to this relief regardless of the nature of the corporate transaction at issue.

In addition, under the Act, shareholders can institute a derivative action if:

- (a) a company has suffered damage or loss, or has been deprived of any benefit, as a result of a wrongful act, a breach of trust, or a breach of faith;
- (b) the company has not instituted proceedings to redress the wrong; and
- (c) the wrongful act, breach of trust, or breach of faith was committed by a director or officer of that company, or by any past director or officer while in office.

The scope of this action is limited to remedy actions detrimental to the company, not to the shareholders. The action only is available if the company has not itself instituted proceeding — a company can initiate proceedings irrespective of the fact that the wrongful act was ratified or condoned.

Foreign shareholders and South African shareholders are treated equally in court proceedings, although a foreign litigant may be asked to provide security for costs.

## V. Financial Information and Auditors

Shareholders of public companies receive interim reports covering the first half of the financial year, provisional annual financial statements, and audited annual financial statements. Under the Act and the JSE Listing Requirements, a copy of the annual financial statements must be sent to the shareholders at least 21 days before the meeting at which they will be considered. Account records must fairly and adequately reflect transactions. Accounting practices must comply with the South African Generally Accepted Accounting Practices (GAAP), which largely follow international generally accepted accounting practices.

Rights and obligations of auditors are governed by the Act, the Public Accountants and Auditors Act, and the Members Handbook of the South African Institute of Chartered Accountants. Generally, auditors must have adequate technical training, maintain their independence, and exercise due care in conducting audits and preparing reports.

Under the Act, the directors of the company appoint the auditors to serve for a one-year term at the general meeting. The shareholders can remove any auditor by resolution. However, where an auditor has reported a material irregularity in writing to the board of directors, the auditor cannot be immediately removed. Within 30 days after making the written report to the board of directors, the auditor may file a copy of the report with the Public Accountants and Auditors Board with any other relevant information. If asked to resign, the auditor must make a declaration either that he has no reason to believe that a material irregularity took place or that he has reported a material irregularity to the Public Accountants and Auditors Board.

## VI. Depositary Receipts/Nominee Rights

As a basic principle, only registered shareholders can attend and vote at meetings or receive dividends or other distributions. Thus, holders of depositary receipts are not entitled to any of these rights. The only way a holder of depositary receipts can attend meetings and vote is if it acts under a proxy from the registered shareholder.

The holders of depositary receipts have no rights against the company and can only seek redress against the entity that put the program together.

## VII. Corporate Governance Code

The King Report on Corporate Governance (“King Report”) is a report compiled by the Institute of Directors in South Africa, which seeks to represent the broad consensus of the South African corporate community. It has, since its publication in 1994, been widely accepted by the corporate community as a code of corporate practice. The King Report has not been adopted as law. However, listed companies on the Johannesburg Stock Exchange are required to disclose in their annual financial statement a statement commenting on the extent of their compliance with the Code of Corporate Practices and Conduct contained in the King Report. The Johannesburg Stock Exchange is in the process of drafting new listing requirements that will likely come into effect in September 2000. The current draft of the new listing requirements seeks to expand on the current requirements for disclosure of reasons for non-compliance with the King Report.



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