

TO: Clients and Friends of the Firm

FR: Frishberg & Partners

RE: Changes in the Authorized Capital of Joint Stock Companies and Minority Shareholder Rights

I. Introduction

For nearly a decade, the Law “On Economic Associations,” dated September 19, 1991, was the cornerstone in the formation and operations of joint stock companies in Ukraine. This task was relatively simple in the context of closed joint stock companies, but open joint stock companies were basically uncharted territory.

Concurrent privatization efforts introduced the actual appearance of publicly traded (or open) joint stock companies into Ukrainian economy, and the need to develop a legal framework for these new structures. These companies needed independent supervision and state intervention, which the Law “On Economic Associations” could never provide, to protect the shareholders (and the public at large) against unfair play. Soon enough, dirty laundry among the shareholders, such as arguments about increases/decreases in capitalization and questions of stock dilution, was aired in the public press (accompanied by an occasional assassination or a kidnapping). Something had to be done to remedy the growing cracks in the Ukrainian corporate world, and quickly.

Spearheading a much-needed effort to introduce even-handed, transparent rules, necessary to prevent a wide range of abuses prevalent among fellow stockholders, on October 16, 2000, the State Commission for Securities and the Stock Market (“SCSSM”) issued a Decision No. 158, entitled “Regulations on the Procedure for Increasing (Decreasing) the Size of the Authorized Capital of a Joint Stock Company.” By its express terms, this act focused solely on clarifying issues governing perhaps the most violated activity in joint stock companies: the procedure for increasing or decreasing the authorized capital.

The timing of the SCSSM’s decision could not be overstated, as before the decision, in order to change the size of a joint stock company’s authorized capital, the shareholders employed the vague provisions of numerous laws, including the Laws “On Economic Associations,” “On State Regulation of the Securities Market in Ukraine,” “On Securities and the Stock Market,” and “On the National Depository System and Peculiarities of Electronic Circulation of Securities,” among others. The overlapping provisions, contained therein, sometimes created more confusion than was absolutely necessary.

On February 22, 2007, the SCSSM replaced Decision No. 158 with the identically named Decision No. 387 (the “Regulations”) which was registered by the Ministry of Justice on March 28, 2007. Note that the Regulations apply to both closed and open joint stock companies. However, they do not apply to cases when the increase or decrease of the authorized capital is done through the exchange of obligations for shares or via the indexation of long-term (fixed) assets. These exceptional cases are regulated by other normative-legal acts of the SCSSM, which are beyond the scope of this discussion.

II. Discussion

A. General Issues

The registration of share issuances, the registration of the prospectus of a share emission and the registration of reports on the placement of shares are registered by the SCSSM or its territorial bodies. Upon an increase of the authorized capital of an open joint stock company, the shares which are intended for placement may be disseminated by way of open (public) or closed (private) placement.

An open joint stock company must conduct an open (public) placement or offer if the share offer is aimed at more than 100 natural persons and/or legal entities other than the existing shareholders of the company. An open joint stock company must conduct a closed (private) placement of shares if the offered shares will be circulated amongst a preliminarily determined group of natural persons and/or legal entities of less than 100 (excluding existing shareholders) on the date of the decision to increase the authorized capital. In case of an increase of the authorized capital of closed joint stock companies, the offered shares must be sold via closed (private) placements.

In general, the decision of the general shareholders’ meeting regarding the open (public) or closed (private) placement of shares must contain the term and procedure of the exercise of the shareholders’ right of first refusal to acquire additionally issued shares. In case of an open (public) placement of shares, the procedure for exercising the shareholders’ right of first refusal to acquire additionally issued shares is established by the joint stock company itself. In case of a closed (private) placement of shares, the term for exercising the shareholders’ right of first refusal may not be less than 15 calendar days.

During the term for exercising shareholder rights of first refusal, the shareholders may exercise their right of first refusal to acquire the offered shares in the amount proportionate to their share in the authorized capital of the company on the date such term commences. After this term expires, any shareholder has the right to demand from the company information regarding the amount of shares sold during the entire term for exercising rights of first refusal.

.....
: If you wish to receive the entire article, please
: contact us at: office@frishberg.com.ua.
:
: Thank you.
:.....