

New Corporate Governance Code 2015

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Background

A new corporate governance code ("Code") came into force on 1 November 2015. The old Code was last revised in 2009. Since then, the EU Commission has made a number of regulatory proposals within the corporate governance field. The Swedish Corporate Governance Board ("Board") has also issued four instructions to the old Code and finally, changes have taken place in recent years to stock exchange rules, which is why the Board was of the opinion that the Code needed updating.

This article deals with the more important news and changes to the old Code. The Board has also produced a marked-up revised Code, which is available on the Board's website, www.bolagsstyrningskollegiet.se. For the sake of simplicity, the numbering in this article follows the numbering used in the Code. The actual rules that companies are obliged to follow are reproduced in more detail in section III.

I. The Swedish Corporate Governance Code

The introductory section that describes the aim of the Code, its target group, its guiding principles, the Board's role and the Code's contents and structure, also makes clear that the Code can also be applied on a voluntary basis by other companies – listed and unlisted – whose shares are not listed for trade on a regulated marketplace in Sweden i.e. at present Nasdaq Stockholm and NGM Equity. The background is that today there are many owners such as the state, that require that companies owned by them apply the Code

in its relevant parts. A company should also be able to apply the code on a voluntary basis without being required to do so by law or the demands of owners.

The "comply or explain" model has been clarified with an express commentary that one or more deviations from the Code do not of themselves mean that the company in question has worse corporate governance. The Board stresses that deviations accompanied by explanations are completely in accordance with the Code and may mean that corporate governance is as good, or even better, than complete compliance. It is not, however, possible to deviate from the requirement on information set out in chapter 10, see section III below for more on this.

II. The Swedish corporate governance model

The Board has chosen in this section to highlight and describe the work of the nomination committee in greater detail than in the old Code. The nomination committee is characteristic of Swedish corporate governance and it has been made clear that the nomination committee is not regulated by the Swedish Companies Act but solely in the Code and that the nomination committee is not a committee of the board but a nominating body for the general meeting, the composition of which is determined by the owners.

In order to simplify further, primarily for foreign owners and to clear up common misunderstandings, a simplified footnote has been included concerning the majority requirements that apply under the Swedish

Companies Act upon the nomination of directors and how directors are appointed. It is not unusual that a proposed board of directors is presented and elected in its entirety at a general meeting. It is stressed, therefore, in the new footnote that each and every one of the shareholders has the right to present its own proposal as to directors and to demand a re-vote for each and every one of the proposed directors, even if there is only a single proposal as to the board of directors. It is also stated that this also applies to discharge from liability that is determined individually for each and every one of the board members and the chief executive officer.

III. Rules for corporate governance

The description of the areas in which the Code is applied has been moved from section I to section III. In order to follow good stock exchange practice, Swedish companies whose shares are listed for trade on a regulated market in Sweden (presently Nasdaq Stockholm and NGM Equity) must, as before, apply the Code.

One piece of news in the Code is the introduction of Board Instruction 2-2010 concerning the application by foreign companies of the Code. Foreign companies, whose shares or custody certificates are listed for trade on a regulated market in Sweden must, in order to follow good practice on the stock exchange, either apply the Code or the corresponding corporate governance rules that apply in the country in which the company has its registered office or where the company's shares are listed. In the event that the company does not apply the Code, the company must state the reason for this and explain in which material respects that the actions of the company differ from the rules of the Code. A further piece of news is that a company listed on a stock exchange must now apply the Code from the time of the stock exchange listing and not as previously from and including the first annual general meeting thereafter. It is not, however, a requirement that the company shall have applied the Code prior to the time of its stock exchange listing. This latter point means, for example, that resolutions of a general meeting concerning the nomination committee etc. can await the first ordinary general meeting that is held after listing.

1) General Meeting

Chapter 1 has in the main been cleared of rules that the Board does not deem to be sufficiently stringent

for their fulfilment to be objectively demonstrated and such rules as follow from the Swedish Companies Act and do not, therefore, require repeating. It has also been made clear that only information regarding the date and place for a general meeting need to be provided on a company's website; the time does not need to be stated.

2) Election and remuneration of the board of directors and auditors

Board Instruction 1-2014 has been brought into chapter 2 unchanged, which means that the nomination committee in assessing the board's evaluation and presentation of a proposal as to a new board must in particular consider the requirement for diversity and breadth in the board and to strive for an equal gender balance. The nomination committee shall also in particular justify the proposed board of directors against the background of the requirement that an equal gender balance is to be sought, both in the written statement justifying the proposal and orally at the general meeting.

However, the nomination committee no longer needs to account for its work at the general meeting itself but instead the report must be submitted in the nomination committee's statement justifying its proposal as to the board and is to be provided on the company's website. It is stressed in the commentary that the report shall be kept short.

3) The tasks of the board of directors

Chapter 3 has undergone a couple of editorial changes and otherwise it mainly clarifies the meaning of the previously applicable rules. One piece of news, however, is the addendum that the board of directors is also to be responsible for risk control in the company and for ensuring that the company's internal guidelines are complied with.

4) The size and composition of the board of directors

Chapter 4 has been left entirely unchanged.

5) The tasks of the directors

An addition has been made in the preamble to stress the responsibility of the directors vis-à-vis the company and the collective of shareholders. The Board has also made clear that the directors' responsibility to acquire such knowledge concerning the company's business, organisation, markets etc. as is required for the assignment continues to apply throughout the assignment and not merely on appointment.

6) Chair of the board

This chapter merely provides clarification of what already applies, i.e. that if the chair resigns during the mandate, the board of directors are to choose from within themselves a chair for the period until a new chair is elected by the general meeting.

7) Board procedures

An editorial change to what was previously 7.4, now 7.3, has taken place with the purpose of showing that the board of directors is responsible for good internal control in all relevant respects, but that formalised routines are only required in respect of financial reporting.

A new rule has been introduced in the light of the board's responsibility for internal control. According to the new rule in 7.4, description of the internal control in the corporate governance report must also comprise the board's actions to ensure that the internal control in conjunction with the financial reporting and that reporting to the board function adequately.

The previous 7.7 regarding the contents of the minutes of the board has been removed because the rule was seen to be far too detailed to have a place in the Code.

8) Evaluation of the board of directors and the chief executive officer

It was previously the case that the board only needed to report *relevant parts* of the result of their evaluation of the work of the board to the nomination committee. The rule has now been adjusted so that the nomination committee must now also have access to all the results of the evaluation. In the commentary it is stated, however, that the rule does not mean that the nomination committee is also entitled unconditionally to access all the material that provided a basis for the evaluation.

In order to increase transparency into the procedure of evaluating the board, a new rule has been introduced to the effect that the corporate governance report must state how the evaluation of the board has been conducted and reported.

9) Remuneration of the executive management

The requirement that the remuneration committee is to consist of directors who have the requisite knowledge and experience of remuneration to executive management has been removed because it is deemed to be

an unnecessary demand that additionally indirectly constitutes a rule on the composition of the board.

The rule in 9.6, which was not previously binding, concerning consideration on the introduction of certain provisos in the structuring of variable cash remuneration to the executive management has been removed in its entirety.

The previous prohibition on share options in incentive programmes directed to the board of directors has been removed because it is deemed to entail an unnecessary restriction to the company's possibility of finding new directors. The purpose of the rule, i.e. to prevent the directors from having a time horizon other than the shareholders' "eternal" perspective, will instead be satisfied by a new rule that stipulates that programmes directed to the board of directors must be structured by the company's owners and must promote long-term shareholding.

A couple of clarifications have also been introduced concerning applicable capital rights and requirements that already follow from the Swedish Companies Act and statements of the Swedish Securities Council Board have been deleted.

10) Information on corporate governance

Chapter 10 has acquired a mandatory character in the new Code. In other words, there is no longer any possibility for companies that apply the Code to deviate from chapter 10 and submit an explanation for this deviation.

The list of information that is to be reported in the corporate governance report has been complemented by references to rules in the new 8.1, the current 7.3 and the new 7.4 to provide a reminder that this information must be included in the report. The requirement that the result of the remuneration committee's evaluation of i) ongoing programmes and those ended during the year for variable remuneration for the executive management, ii) application of guidelines for remuneration to executive management, iii) applicable remuneration structures and iv) remuneration levels in the company, are to be reported on the company's website has been brought forward from two to *three weeks before the annual general meeting*. The purpose of this is to align with other information requirements ahead of the general meeting such as the provision of the annual accounts, the corporate governance report, proposed resolutions etc.

Summary

In conclusion, the biggest news in the revised Code is that companies that are listed on a stock exchange are now to apply the Code from the time of listing and that chapter 10 is now mandatory. Over and above this, the adjustments in chapter 9 meaning that the company and the owners are given freer choices in structuring incentive programmes and remuneration models are also worth mentioning. Finally, we will see during this spring's annual general meetings more detailed corporate governance reports with regard to the fact that further demands have been introduced concerning the board's responsibility for, and reporting of, internal controls and reporting of how the evaluation of the board has been conducted and reported.

As mentioned, the new Code entered into force on 1 November 2015. The Board has deemed there is no need for transitional rules, which is why the new rules apply unconditionally from the above-mentioned date.