SWEDISH
CORPORATE
GOVERNANCE BOARD

Comments regarding Ministry of Justice Memorandum Ds 2012:37 on increased share capital for listed companies.

Ministry of Justice Memorandum Ds 2012:37 contains proposals on facilitating access to capital in listed companies and certain amendments by Bolagsverket, the Swedish Companies Registration Office. The Swedish Corporate Governance Board's (the Board's) comments confine themselves to the issue of access to capital.

On the issue of access to capital in listed companies, the memorandum primarily discusses private placements of shares, convertible bonds and warrants. The memorandum contains two proposals on the subject.

The first proposal would mean editorial changes to certain stipulations in the Swedish Companies Act (2005:551) to remove a preparatory statement on permission for private placement offers to people who are already shareholders in the company. The Board has no objections to the removal of this statement in the way proposed in the memorandum.

The second proposal calls on the Board to produce a recommendation on accepted stock market principles for private placements. This proposal is examined below.

Rights issues

While the Board would not like Swedish legislation to differ too greatly from that found in other countries, it feels that any decision to limit existing shareholders' preferential position in rights issues should not be taken lightly.

The primary arguments for allowing deviation from preferential rights are that:

I. Rights issues take a long time to implement, and
II. Costly prospectus requirements become applicable.

The length of time required affects not only the company's ability to acquire capital quickly, but also its ability to place an issue without the market being affected by information regarding the issue.

It is the opinion of the Board that legislators should examine in detail the extent to which it is possible to improve regulations regarding rights issues in these aspects.

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Prospectus requirements

The Financial Instruments Trading Act (1991:980) requires companies to produce prospectuses. Prospectuses are to be produced both when instruments are offered to the public and when they are admitted for trade on a regulated market. A rights issue by a listed company almost always means that a public offer is made, because of the number of existing shareholders. Since all financial instruments of a type that is already admitted for trading must be available for trade, when a new issue of a class of shares that is already listed is made, the new shares must also always be listed. This means that the prospectus requirement is also always triggered when rights issues are made.

There are a number of exceptions to these prospectus requirements. If a rights issue is both a public offer and the shares are to be admitted for trading, there must be applicable exemptions to the regulations regarding both the offer and admission to trading if a prospectus is not to be required. Chapter 2, Section 6 of the Financial Instruments Trading Act states that a prospectus is not required if the number of newly issued shares is less than ten per cent of the total number of shares of the same class that are already available for trade during a rolling twelve-month period. There is, however, no equivalent exception when shares are offered to the public. The only similar exception is found in Chapter 2, Section 4 of the Act, which sets a subscription amount limit of 2.5 million Euros during a rolling twelve-month period. In practice this means that a rights issue in a listed company always required the production of a prospectus.

Like the regulations governing exceptions, the prospectus requirements came out of the European Union's Prospectus Directive (2003/71/EC). This directive does not allow the rolling ten per cent exception to also cover public offerings in the form of rights issues. The Board's opinion, however, is that such an exception should be considered and, if possible, be introduced into EU legislation when the Prospectus Directive is next reviewed, although an investigation into whether it would be possible to allow implementation of parts of the Prospectus Directive through self regulation, and, if so, whether such an exception could be introduced, should be carried out without delay. Given the obligation of listed companies to release all information that may impact share prices immediately, the reasons to maintain the prospectus requirements for rights issues weigh less heavily than those against – the costs and delays incurred by the companies.

Time period for rights issues

According to the current stipulations in the Companies Act, the time period for conducting a rights issue in a securities company is a minimum of three weeks, providing that the shareholders' meeting has previously authorised the company board to conduct a rights issue. Firstly, the mandatory record date is to be no earlier than one week after the board's decision to conduct the rights issue, and then there must be a subscription period of at least two weeks – see Chapter 13, Sections 4 and 5 of the Companies Act. Both the period between the

board's decision and the record date and the minimum subscription period are governed by European Union companies directives, with no possibility to reduce these time periods without changes to the directives.

In the view of the Corporate Governance Board, there should be an investigation into whether it is possible to find a common European model for faster rights issue processes, thereby enabling changes to the relevant EU directives. Consideration should be given, for example, to whether it could be made possible for shareholders to register interest in participating in possible future rights issues in order to be able to reduce lead times.

One aspect of using rights issues that causes problems is that the share price can be traded down towards the issue price during the issue period, which has meant that many companies have felt forced to purchase expensive underwriting. In order to reduce the risk of falling prices, the introduction of a short-selling ban during the placement period should be considered.

Self regulation for private placements

The Corporate Governance Board welcomes the opportunity to propose rules for private placements in listed companies. This work will, however, take time, as it requires extensive consultation with market actors – companies, shareholders and other investors, as well as their advisers – and rigorous impact assessments of different regulatory alternatives. The purpose of the new rules must be to improve companies' possibilities to gain access to capital without reducing shareholder protection.

The statutes of the Board allow it to not only issue rules to be applied using the principle of comply or explain, but also mandatory rules for listed companies with no room for deviation with explanation. A regulatory framework for private placements should follow the latter model, with the aim of replacing the Swedish Securities Council's statement 2002:2.

Stockholm, 15 January 2013

THE SWEDISH CORPORATE GOVERNANCE BOARD

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