

CORPORATE LAW

INFORMATION LAW FOR COMPANY PARTICIPANTS – THE SEARCH FOR A BALANCE OF INTERESTS

At the present time, in various legal relationships there exists the acute problem of observing a balance of interests concerning the parties involved in these legal relationships, their legal rights, and their mutual economic needs. Judicial practice, when considering disputes between these kinds of parties, takes into consideration not only the formal requirements of legislation, but also the real economic and legal goals and interests of the participants. Corporate relations are not an exception. One of the specific peculiarities of these legal relationships is the right of company participants to receive information on the company's activities. In this article, we will examine the main trends in regulatory enforcement practices for reviewing disputes concerning complying with information law by company participants, and assess the possible future prospects for the development of these trends.

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The main aspects of regulation

Obtaining information on the company's activity is a high-priority benefit for the participant due to its legal status. «In exchange» for its material contribution to the company, this participant gets the right to have information about various areas in the company's economic and legal life. On the one hand, this right provides the possibility for the participant to exercise control (even if in an abridged form) over the company; however, on the other hand, it opens the possibility for the participant, acting unscrupulously, to derive benefits for itself, or to take ownership of information gained in order to cause harm to the company.

Actualizing the rights of company participants to receive information is accomplished in accordance with the statutory provisions for joint-stock companies (articles 90-93 in Federal Law No. 208-FZ, dated December 26th, 1995 entitled "On joint-stock companies"). Along with this, the law establishes the requirements for the procedure on disclosing this kind of information, and for the procedure for submitting requests and what they contain. Legislators also established a differentiated approach for shareholders, depending on the amount of participating stock they have in the company (up to 25% of all voting shares and higher than 25%); the relevant provisions are formalized in section 1, article 91 in the Federal Law No. 208-FZ.

This means that, by default, any query made by a company participant that technically meets the requirements outlined in the Federal Law No. 208-FZ must receive an answer from the company.

However, in practice companies have been forced to run into unscrupulous participants that used information that they received to cause harm to the company, or to derive advantageous benefit for themselves by circumventing the law's requirements. Owing to the considerable number of disputes between companies and their participants regarding information disclosure, Information Statement No. 144, issued by the Russian Supreme Arbitration Court (SAC) Presidium and dated January

18th, 2011, entitled "On some issues concerning the practice of arbitration courts reviewing disputes about furnishing information to business entity participants" (hereinafter – SAC Information Statement No. 144), was adopted.

The Information Statement indicated resolved existing issues relating to how legislative provisions are applied in terms of the company furnishing its participants with information. In particular, it articulates the signs when the law is being abused as a basis for rejecting a participant's demands to be provided with information. For example, a participant's demands to provide it with information may not be satisfied even if his right to information has not been violated in principle, but it shall be proved that the participant, who have requested the information, is a de facto competitor of the company (or its affiliate), the information requested is confidential and spreading it might cause harm to the company's commercial interests. An additional legal basis, in this case, is the application of article 10 of the Russian Federation Civil Code.

It is worth paying attention to the fact that the SAC Information Statement No. 144, specifically uses the potential to cause harm to the company's interests, and not proof that actual harm has been caused. Undoubtedly, this formulation leaves more scope for arguments from the company than the participant about any hypothetical harm to commercial interests. Another limitation is the objective lack of requested information (documents) from the company, as well as the plaintiff (applicant) losing its status of company participant by the time the dispute is reviewed.

The general focus of SAC Information Statement No. 144 can be determined as follows: while reviewing disputes regarding the provision of information to a company participant, the court should establish the real goal for obtaining the information, the objective possibility of the company to provide it, and compliance with formal requirements when the participant submits its request.

The Russian Federation Constitutional Court has not been sitting on the sidelines.

In its Ruling No. 263-O dated June 18th, 2004, the Constitutional Court concluded that the first paragraph of clause 1, article 91 of the Federal Law No. 208-FZ concerning the obligation of a joint-stock company to provide shareholders with access to its documents is directed, inter alia, towards ensuring the company's informational transparency concerning its economic activity, and the possibility for shareholders to exercise their rights. In addition, it is necessary to take into consideration that in accordance with article 17 (section 3) of the Russian Federation Constitution, exercising citizens' and human rights and freedoms should not mean the violation of the rights and freedoms of other people. The Constitutional Court also stressed that one of the specific features of a joint-stock company (in particular, an open joint-stock company) is that shareholders can be unlimited in number, including those who control small stakes, which determines the existence of special measures of protection and rules for accessing information that is not public.

Methods for protecting rights

The most effective way to protect company participants' rights that have been violated by a refusal to provide information without sufficient grounds is, of course, through litigation. In this case, the claim is formulated by the plaintiff to obligate the company to provide the requested documents or information. Recognition of the unlawful refusal of the company to provide information may be an additional requirement.

The following facts in proof are included in such disputes: the submission of a request by a company participant in compliance with legislative requirements, the possibility for the company to provide information, the wrongful refusal to provide such information, and the absence of any indication that rights have been abused by the participant (when determining this criterion, the court should determine the real objective of the participant in obtaining information).

A participant who has been wrongfully denied access to information is not deprived

of its right to also demand compensation for losses in accordance with article 15 of the Russian Federation Civil Code. The scope of facts in proof for this kind of dispute is, without a doubt, more expansive – but if the claim is satisfied, besides information the plaintiff will receive financial compensation for losses that are caused.

In addition, failure on the part of the company to provide information could fall under the scope of offenses stipulated in section 1, article 15.9 of the Russian Federation Administrative Offenses Code. The authority to hold the company liable in this case lies with the Russian Federation Central Bank as a major industry regulator for Russian financial markets. When appealing a ruling about holding a company administratively liable, the participant may act as a third party that is not petitioning any claims on its own with respect to the dispute's subject matter, and give the court the necessary explanations. At the same time, the arbitration court will also investigate the legality of the company's failure to provide information to its participant (Ruling from the Volga-Vyatka District Arbitration Court dated March 6th, 2017 in case No. A79-6332/2016).

Criteria for dispute resolution

Since SAC Information Statement No. 144 was adopted 6 years have passed already, and judicial practice has run up against new circumstances to consider when reviewing disputes. However, the general rule applied to the refusal to provide information due to the possibility of inflicting harm to the company's commercial interests has stayed the same.

In particular, the court recognizes requests for documents that are submitted not for the shareholder to exercise its rights, but to destabilize the company's business, as signs that the participant is abusing its rights. Another sign is sending several identical requests, or requests that complement each other in a short time span, even though the participant could have united all the requests into one that was integrated. These actions on the part of the participant are qualified by the courts as increasing the number of fines (Ruling from the Volga Region Arbitration

Court dated January 20th, 2015 in case No. A65-16217/2014).

The courts also reject participants' claims on the basis that the plaintiff's demand to provide information, in the absence of the company's refusal to provide it, is abuse of rights within the meaning of article 10 of the Russian Federation Civil Code. Through these kinds of actions the plaintiff, in the opinion of the courts, creates an artificial situation that is focused on inflicting harm to the company (Ruling of the Moscow District Federal Arbitration Court dated July 5th, 2012 in case No. A40-84875/2011).

In practice, one case is noteworthy – a participant's demand for documents, which had not been given by the participant himself to the company earlier, was rejected (Ruling of the Moscow District Federal Arbitration Court dated March 29th, 2016 in case No. A41-69463/2014).

The courts, when reviewing disputes in this category, proceed from the necessity of the participant to justify the need for the information requested, as well as its scope and content. The unjustified inclusion of an excessive amount of information that presents a commercial interest for the company or its competitors may be qualified by the courts as a sign that the participant is abusing its rights (Ruling of the Central District Arbitration Court dated June 3rd, 2016 in case No. A35-7629/2014).

It seems that precisely these criteria are subject to priority identification by an arbitration court when considering a dispute related to the failure of a company to provide information to its participant. The line between balance of interests for the participant and the company should be determined by the court in each case individually, but applying a general approach with the inadmissibility of the abuse of rights and causing even hypothetical harm to the company should such documents be provided to the participant. However, a participant whose real interest entails receiving information to sell its shares, or for another legitimate economic cause, has the right to possess the full scope of information that must be provided to him by law. 📌