

# Features of a Business Company its Shares Are Issued In the Form of Digital Financial Assets

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Abstract: Federal Law No. 259-FZ dated 07/31/2020 "On Digital Financial Assets, Digital Currency and Amendments to Certain Legislative Acts of the Russian Federation" expanded the existing dispositive approaches to regulating the legal status of a non-public joint stock company. Since the beginning of 2021, the way has been opened for their creation, existence, and termination in the information and telecommunications network "Internet", namely in information systems with the functionality of issuing digital financial assets. In this law, digital rights, including the rights to participate in the capital of a non-public joint-stock company, are recognized as one of the types of digital financial assets. The legislator has outlined a legitimate "digital Internet equivalent" of a non-public joint-stock company; it is allowed to issue shares of the authorized capital in the form of digital financial assets. As a result, the authors proved that in the 4th year of the Federal Law No. 259-FZ dated 07/31/2020, there is not a single newly created non-public joint stock company whose shares would be issued in the information system in the form of digital financial assets. This confirms the complete lack of demand for the construction of "digital rights of participation in the capital of a non-public joint-stock company" due to non-viability, namely, the definitive vagueness and excessive bulkiness of this design according to the scheme "rights to rights". On the other hand, taking into account modern legal regulation, the authors consider the procedures for issuing shares of a newly created non-public joint stock company to be simple in the traditional way. Inaccuracies and contradictions of legislative prescriptions are revealed, the excessive cumbersomeness of the design of digital rights, including the rights to participate in the capital of a non-public joint-stock company, is justified. Proposals are being made to improve and develop investment legislation.


## 1 INTRODUCTION

In 2009, a promising task was set in the Concept of the Development of Civil legislation of the Russian Federation: "joint-stock companies that do not have a public status should not turn into limited liability companies, which actually happens with closed joint-stock companies" (The Concept, 2009). To solve this problem, in 2014, the norms of the Civil Code of the Russian Federation (Civil Code, 1994) (hereinafter

referred to as the Civil Code of the Russian Federation) introduced the division of business entities into public and non-public. In Federal Law No. 99-FZ of 05.05.2014 (Federal Law No. 99-FZ of 05.05.2014), in particular, Article 66.3 was added to the Civil Code of the Russian Federation, in which the concept of a non-public joint-stock company is formally derived by analysis and synthesis based on etymology.

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As S.A. Chekhovskaya correctly notes, the changes made to the Civil Code of the Russian Federation in terms of regulating the activities of legal entities, as well as changes in the laws on business companies, are the result of the previous development of corporate practices of Russian business. As well as an attempt to create a new Russian's model of closed, non-public companies. However, in business practice, joint-stock companies are limited to changing their names and are not yet ready to determine to what extent the dispositive possibilities of "other" internal regulation are important for them. An analysis of the charters of individual joint-stock companies that have changed their names allows us to conclude that, at best, the company has excluded the audit commission from its management structure (Chekhovskaya S.A., 2016).

In Article 66.3 of the Civil Code of the Russian Federation, the legislator submitted a number of issues of statutory creativity to the unanimous decision of the participants (founders) of a non-public company. Thus, the shareholders of a non-public joint-stock company have the right in the charter to consolidate the powers of the collegial management body of the company or the collegial executive body of the company to resolve a number of issues referred by law to the competence of the general meeting. For example, determining the number, nominal value, category (type) of declared shares and the rights granted by these shares. In addition, on the refusal to create a collegial executive body; on the transfer to the sole executive body of the company of the functions of the collegial executive body of the company. Also in these dispositive permissions are questions about the procedure for exercising the pre-emptive right to purchase shares placed by a joint-stock company or securities convertible into its shares. Also on the assignment to the competence of the general meeting of shareholders of issues not related to it in accordance with the Civil Code of the Russian Federation or the law on Joint Stock Companies, etc. In addition, the participants of a non-public company may regulate many issues not in the articles of association; they may conclude a corporate agreement to which all participants of this company are parties. This is quite a flexible and cumbersome approach, since it is not associated with the state registration of legally significant facts from the life of an organization and the entry of information into the Unified State Register of Legal Entities. Shitkina I.S. also notes the dispositive regime of regulation of the activities of non-public companies, which implies significant opportunities for self-regulation of the

internal structure of the company (Shitkina I.S., 2021).

Regulated by the Civil Code of the Russian Federation and Federal Law No. 208-FZ dated 12/26/1995 "On Joint Stock Companies", a non-public joint stock company continues to exist with undocumented shares, as before. Shares of such a company, after interaction with the Bank of Russia, are recorded on the registrar's personal account, on the deposit account in the depository, and are placed behind the scenes within a narrow circle of persons by closed subscription. Article 7 of Federal Law No. 208-FZ details the dispositive variations of the provisions of the charter of a non-public joint-stock company. It should be added that paragraph 8 of Article 7 of Federal Law No. 208-FZ dated 12/26/1995 specifies that a number of possible provisions of the charter of a non-public joint stock company should be included in its charter. Amended and (or) excluded from its charter by a decision adopted by the general meeting of shareholders unanimously by all shareholders of the company. In addition, the norm of paragraph 4 of Article 48 allows the charter to form the competence of the general meeting of shareholders beyond those provided for by the said law (Federal Law No.208-FZ of 26.12.1995).

## 2 RESEARCH

In our opinion, in 2024, the rights of shareholders of a non-public joint-stock company provided by law for statutory creativity are very diverse, which allows them, at their discretion, to build corporate relations in a closed business community in which. As a rule, several dozen people participate, who, as a rule, are familiar with each other, and often they have related relationships. Gabov A.V. rightly points out that the division into public and non-public companies clearly indicates that the legislator distinguishes two types of securities market: regulated and unregulated (or less intensively regulated). In the second case, its participants receive more opportunities and dispositive regulation, but at the same time, they have a limited opportunity to participate in the public market. The model of regulating the legal status of a non-public company: do what you want within the established framework, but using such preferences, you cannot attract investors through a public offering, since with such regulation the risks of investors are unpredictable (Gabov A.V., Krasil'nikov M.V., Bojko T.S., 2016). It is true that a non-public joint-stock company is deprived of the function of providing shares to everyone; this company is more

closed and inaccessible to an random person wishing to become a shareholder (Kuemzhieva S.A., Netishinskaya L.F., Skladchikov S.V., Goncharov V.V., 2020). At the same time, a minority participant in a non-public company in most cases does not have a real opportunity to return the invested investments by selling its shares to a third party or to the company. In addition, for members of a non-public society, their joint business is often a matter of a lifetime (Boyko T.S., 2017).

In 2020, we witnessed a new attempt at legislative impetus for the development of the Russian model of non-public business companies. Federal Law No. 259-FZ of July 31, 2020 "On Digital Financial Assets, Digital Currency and on Amendments to Certain Legislative Acts of the Russian Federation" (Federal Law No. 259-FZ of 31.07.2020) expanded the available dispositive approaches to regulating the legal status of a non-public joint stock company. Since the beginning of 2021, the way has been opened for their creation, existence, and termination in the information and telecommunications network "Internet", namely in information systems with the functionality of issuing digital financial assets. The law recognizes digital rights as one of the types of digital financial assets, including the rights to participate in the capital of a non-public joint stock company (Federal Law No. 259-FZ of 31.07.2020). Here we do not have the opportunity to be distracted by an excursion into the science of finance, in which the capital of an organization is usually differentiated into several categories, we will make a confidential assumption that the legislator in the formulation of "the right to participate in capital ..." means precisely the authorized capital of a non-public joint-stock company. We will also trust the legislator that the rights of participation in capital are identical to the rights of a shareholder, although a discussion is also possible here.

In our opinion, Federal Law No. 259-FZ of 31.07.2020 outlines a legitimate "digital Internet equivalent" of a non-public joint-stock company, which is allowed to issue shares of the authorized capital in the form of digital financial assets. We agree with Kress V.V. that the same non-public joint stock company does not have the right to issue shares in the traditional way, as well as issues of shares in the form of digital financial assets (Kress V.V., 2024). We believe that only shares, as well as additional issues of these securities in the form of digital financial assets, are allowed for the "digital Internet equivalent" of a non-public joint stock company initially created in one of the information systems. This is the only way for an investor to

exercise digital rights of participation in the capital of a non-public joint stock company.

On the website of one of the operators of the information system in which digital financial assets are issued, useful properties are indicated, which we consider very questionable. Namely: "this type of digital financial assets – digital rights of participation in the capital of a non-public joint stock company - is convenient when creating joint SPVs (project companies) in order to implement large projects that require a significant amount of financing. In this case, the number of digital financial assets owned by him will determine the share of each SPV participant in the project. Smart contracts underlying digital assets will make it possible in the future to provide for the order of profit distribution, exit from the project, as well as implement corporate governance and decision-making functions by shareholders." (Tokens LLC: official website, 2024). It is unclear what exactly is convenient here to attract large project capital. No contracts provide for the distribution of profits, this be decided at the general meeting of shareholders. How can the "digital form" of a non-public joint-stock company affect the corporate governance function in general?

At the same time, paragraph 7 of Article 12 of Federal Law No. 208-FZ of 26.12.1995 "On Joint Stock Companies" prohibits the amendment of the charter of an existing non-public joint stock company by introducing a provision on the possibility of issuing shares of a non-public joint stock company in the form of digital financial assets. The same provision cannot be excluded from the articles of association if it was written into the articles of association when establishing a non-public joint-stock company. Consequently, the "digital Internet equivalent" of a non-public joint-stock company is legitimate only from scratch, as a newly created business company. According to article 25 of the law, shares of a non-public company can be issued in the form of digital financial assets, taking into account the specifics and conditions defined by Federal Law No. 259-FZ of 31.07.2020 and analyzed further.

Federal Law No. 39-FZ of 04/22/1996 "On the Securities Market" (Federal Law No. 39-FZ of 22.04.1996) is also concise with regard to a non-public company whose shares can be issued in the form of digital financial assets. In article 8 of the law, the legislator includes the maintenance of a register of shares of a non-public joint-stock company in the form of digital financial assets and the provision of information from it in the activities of maintaining the register of owners of securities. Paragraph 11 of Article 8.2 of the law establishes that depositories can

open accounts of the owner's depot to account for his digital rights, but these depot accounts cannot transfer digital rights, encumber them and restrict their disposal. Paragraph 13 of Article 8.5 of the law states that in the event of a transfer in the information system of digital rights recorded in the depot account, such rights are subject to write-off from the specified account in accordance with the terms of the depository activity on the day when the depository learned (should have learned) about this circumstance. Such a brief mention of a non-public joint-stock company with shares of the authorized capital in the form of digital financial assets in Federal Law No. 39-FZ dated 22.04.1996 is quite logical, because there are no shares of a non-public company a priori and cannot be on an organized market.

Yu.V. Sakharova argues that the main and only difference between the "digital shares" of a non-public joint-stock company from its own shares, only in an undocumented form, is a different way of accounting for the rights to these securities. According to the author, we should not talk about the possibility of issuing "digital shares" by a non-public joint-stock company, but about a new type of joint-stock companies built around "digital shares". Also Sakharova Yu.V. sees a contradiction between Articles 2 and 16.1 of Federal Law No. 39-FZ of 22.04.1996 to paragraph 11 of Article 1 of Federal Law No. 259-FZ of 31.07.2020 in the part that the norms of the latter do not apply to the issue. Accounting and circulation of undocumented securities, and "digital shares" allegedly issued by a non-public joint-stock company (Sakharova Yu.V., 2023). We do not see any contradictions here, since there are no "digital shares", digital rights (digital financial assets) to participate in the capital of a non-public joint-stock company are issued in the operator's information system, and non-documentary securities (shares) are not really issued. The legal regulation of the entire business cycle (creation, establishment, reorganization, liquidation) of a non-public joint-stock company as a legal entity is regulated in Articles 8-24 of Federal Law No. 208-FZ of 26.12.1995. At the same time, this law and order not affected by the fact that its shares are issued in the information system in the form of digital financial assets and exist as digital rights to participate in its capital.

According to Article 39 of Federal Law No. 208-FZ of 26.12.1995, a non-public joint stock company has the right to place shares and equity securities convertible into its shares through a closed subscription. Otherwise, offer them for purchase to a

limited number of persons by a decision of the general meeting of shareholders on an increase in the authorized capital, adopted by a majority of 3/4 of the votes of shareholders - owners of voting shares participating in the general meeting of shareholders. When placing preferred shares – according to the decision adopted unanimously by all shareholders of the company. We believe that within the same framework, a decision should be made on the creation of a non-public joint-stock company and its shares in cooperation with the operator of the information system in which digital financial assets are issued.

Letter of the Bank of Russia dated 03/09/2021 No. 28-1-3/1220 "On the Requirements for the Decision to Issue Shares in the form of Digital Financial Assets placed at the Establishment of a Non-public Joint Stock Company" (Letter of the Bank of Russia, 2021) is important in the context set forth. It confirmed that there are no specifics of creating non-public joint-stock companies whose shares are issued in the form of digital financial assets associated with the moment of state registration of such a joint-stock company as a legal entity. Consequently, the registration of the issue of such shares, as well as the registration of the issue of classic shares placed at the establishment of a joint-stock company, is carried out before the state registration of the joint-stock company as a legal entity. The decision on the issue of shares to be placed upon the establishment of a joint-stock company is approved by the constituent assembly (the sole founder), must contain an indication that it is addressed to a certain circle of persons. Obviously, since at that moment the state registration of such a non-public joint-stock company has not yet occurred, information about this registration will be missing from the decision to issue shares in the form of digital financial assets. Let us clarify that after interacting with the operator of the information system regarding the issue of shares in the form of digital financial assets. The initiators of the creation of a non-public joint stock company will also have to perform all registration actions provided for by Federal Law No. 129-FZ dated 08.08.2001 "On State Registration of Legal Entities and Individual Entrepreneurs" (Federal Law No. 129-FZ of 08.08.2001) when creating a legal entity, in the territorial body of the Federal Tax Service.

Attention should be paid to the contradictory legislative identification of the terms of the legal matter under study. So, in paragraph 1 of Article 13 of Federal Law No. 259-FZ of 31.07.2020, we see that after the phrase "digital financial assets certifying the rights to participate in the capital of ... a joint-stock company", it is further indicated in parentheses:

"shares ... of a joint-stock company issued in the form of digital financial assets".

It turns out that digital financial assets are certificates of participation rights, but at the same time, the law equates these participation rights to the shares themselves, which are issued in the form of digital financial assets, however, the rights of a shareholder are significantly broader than participation only. If we return to paragraph 2 of Article 1 of Federal Law No. 259-FZ of 31.07.2020, it is stated here that digital financial assets are digital rights, including the rights to participate in the capital of a non-public joint stock company. As a result, the legislator does not give definitive clarity: whether digital financial assets are digital identity (marking, certificate, certificate), or digital rights of participation in capital are a substitute for the classic undocumented registered shares. As a result, this definitive vagueness is burdened by a very cumbersome construction of the "right to rights to rights", which does not appeal at all to business people who intend to create a non-public joint-stock company (Federal Law No. 259-FZ of 31.07.2020).

When creating a non-public joint-stock company (whose shares are issued in the form of digital financial assets), the rights to shares of this company are alternatively recorded in the information system instead of the registrar/depository. The operator of the information system in which the issue of digital financial assets is carried out – the rights to participate in the capital of a non-public joint-stock company, becomes an issuing centre (paragraphs 3-7 of Article 13 (Federal Law No. 259-FZ of 31.07.2020) and acts taking into account a number of features.

First, the operator replaces the state registration of the issue of shares, which is not required; it is enough to register the issue in the operator's information system. Secondly, it controls the indication in the decision on the issue of shares of a non-public joint stock company in the form of digital financial assets that shares in the form of digital financial assets are recorded in the information system. As well as the presence in the decision of a warning about the risks associated with the acquisition of such shares.

Third, it controls the indication in the charter that the accounting of shares in the form of digital financial assets is conducted in an information system. Recommends including in the charter of a non-public joint stock company certain methods of convening and holding a general meeting of shareholders, ways of notifying shareholders about the implementation of corporate actions provided for by the rules of the information system.

Fourth, it controls, including by the content of the charter, the initial creation of a non-public joint-stock company and the issue of its shares in the form of digital financial assets precisely and only at its establishment.

Fifth, the operator does not allow the acquisition of public status by a non-public joint-stock company (whose shares are issued in the form of digital financial assets), for example, by notifying the registration authority of legal entities about the presence of these shares in the operator's information system. Of course, the question arises how exactly the information system operator finds out about such illegal actions of a non-public joint-stock company, but the legislator leaves it unanswered.

Sixth, the operator does not allow a non-public joint-stock company (whose shares are issued in the form of digital financial assets) to issue other equity securities, including those convertible into its shares. Here the above question arises, how exactly the information system operator finds out that a non-public joint - stock company, for example, has issued non-documentary bonds. What are the legal consequences of such a violation of the law expected for the operator and for the violator himself?

Seventh, it does not allow the conversion of shares by a non-public joint-stock company (whose shares are issued in the form of digital financial assets) into shares not in the form of digital financial assets, including during reorganization.

Eighth, it does not allow the conversion of shares by a non-public joint-stock company (whose shares are traditionally issued) into shares in the form of digital financial assets, including during reorganization. Ninth, the operator of the information system in which digital financial assets are issued opens a nominal account with a Russian credit institution. Through this account, transit payments are made from the founders for shares of a non-public joint-stock company to its account also in a Russian credit institution.

During the period of activity of the established non-public joint stock company (whose shares are issued in the form of digital financial assets), digital rights of participation in its capital are recorded in the information system in the form of records in the ways and according to the rules approved by the operator of the information system. Instructions on such records may be given to the operator by: the issuer is a non-public joint stock company; the shareholder is the owner of digital financial assets – digital rights to participate in its capital; the new acquirer of these digital financial assets; the court; the investigator; the bailiff; the notary.

### 3 CONCLUSIONS

According to the data of the Federal Tax Service, as of 01.05.2024, there are 21467 non-public joint-stock companies in the Russian Federation, the entry of which is entered in the Unified State Register of Legal Entities. Historically, on this date, 140,230 such societies had previously existed and ceased to operate for all reasons. At the same time, 118 times more as of 01.05.2024, a limited liability company (2545789 persons) operates in the Russian Federation, and 6894591 companies have ceased operations for the entire period of registration. In 4 months from the beginning of 2024 81596 limited liability companies have been newly established, which is 108 times more than the number of newly created non-public joint stock companies (754 companies) (Federal Tax Service: official website, 2024).

We emphasize that in the 4th year of the Federal Law No. 259-FZ of 31.07.2020, there is not a single newly created non-public joint stock company whose shares would be issued in the information system in the form of digital financial assets. This confirms the complete lack of demand for the construction of "digital rights of participation in the capital of a non-public joint stock company" due to non-viability, namely, the definitive vagueness and excessive bulkiness of this design according to the scheme "rights to rights to rights". On the other hand, given the current legal regulation, we do not see any particular difficulty in issuing shares of a newly created non-public joint stock company in the traditional way.

Thus, it is necessary to adjust the legislative interpretations of both the category of digital financial assets and their varieties. In our opinion, the term digital investment equivalents is more meaningful and accurately reflects the legal nature of this innovative investment technology. In the context of Article 128 of the Civil Code of the Russian Federation, this is another property. They should include legal fictions of well-known issue and other investment objects, as well as provide for a promising expansion of this composition, legitimize. In particular: digital monetary claims, digital bonds, digital shares, digital options of the issuer, digital Russian depositary receipts, utilitarian digital rights, digital rights of participation in the capital of a limited liability company, digital rights of participation in a non-profit organization, etc. At the same time, the Bank of Russia, based on the experience of the digital ruble platform, should form a single online platform for digital investment equivalents, where they will be issued, accounted for, and redeemed within the

framework of a centralized prudential blockchain (Goncharova M.V., Goncharov A.I., 2023). We also believe that during the period up to 2030. A unified Internet platform should be created under the Ministry of Justice of the Russian Federation, on which digital registration and accounting of legal entities of all organizational and legal forms, including non-public joint-stock companies with digital shares of authorized capital, will be carried out.

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