

## Crucial Phase for Say on Pay – Measured and Practical Implementation of the Minder Initiative in View

The Federal Council has published a preliminary draft ordinance on say on pay for consultation. Under the given circumstances, the first assessment is positive. While the preliminary draft keeps close to the text of the Initiative, it appears that the attempt to best safeguard private autonomy and to guarantee a practical and flexible implementation was successful. The new provisions concern stock corporation law, pension law and criminal law. For reasons of clarity, all of these law sectors have been included in a single ordinance (stock corporation law: paragraphs 2-9; pension law: paragraph 10; criminal law: paragraph 11).

The ordinance applies to stock corporations which are subject to Swiss law with shares listed on a Swiss or foreign stock exchange.

In the following, you will find an overview of the most important key points of the new regulations:

### Vote on the Compensation of Board Members and Management

According to the ordinance, the general meeting must vote prospectively and separately on the fixed compensation of the board of directors, the management and the advisory board for the duration until the next ordinary general meeting. In addition, the general meeting has to vote retrospectively and separately on the variable compensation of the board of directors, the management and the advisory board for the closed business year. For possible additionally appointed members of the management, who are appointed after the approval of the fixed compensation, the articles of association may provide for an additional amount which in such case does not have to be approved by the general meeting.

The articles of association may also provide for rules that differ from the above regime as long as the general meeting votes on the compensation of the three bodies separately on an annual basis and as long as these votes have binding effect. This provision allows, for example, to vote in advance on the fixed as well as the variable compensation and to obtain the approval of the board of directors for the business year and not only for the period between two ordinary general meetings. Finally, it is not necessary to split up into fixed and variable compensation. The predictability and legal security of the compensations shall therewith be guaranteed through the approval of a budget for the upcoming business year.

The board of directors must render account on the paid compensations in an annual compensation report.

## Prohibited Compensations

The preliminary draft of the ordinance confirms that the following types of compensations are prohibited in the future:

- termination payments (golden parachutes);
- advance compensation payments;
- bonuses for buying or selling companies or parts thereof;
- loans, credit, retirement benefits and performance-related compensations which are not provided for in the articles of association; and
- equity securities, conversion or option rights which are not provided for in the articles of association.

Even though various questions are still open, the explanatory report on the ordinance at least clarifies the important issue that sign-on bonuses are to be distinguished from compensations paid in advance. Such sign-on bonuses, which often compensate the obvious disadvantages a person suffers due to a job change, are still permissible.

## Election and Composition of the Board of Directors

In the future, each member of the board of directors is elected individually. The members have to be elected annually, re-election is permissible. The chairman of the board of directors and possible proxies also have to be elected by the general meeting. The same applies to the members of the compensation committee of the board of directors. All of the above can be elected for the duration of one year, re-election is permissible. Therewith it will be mandatory for the board of directors to commission a compensation committee. The details are to be regulated in the articles of association.

## Abolition of Corporate Proxies and the Representation by Depositary Banks

Corporate proxies and the representation of shareholders by depositary banks will be abolished.

In the future, the only form of permitted institutional representation will be the independent proxy who will have to be elected annually by the general meeting. If the independent proxy does not receive instructions regarding the voting rights transferred to him, he must abstain from exercising the respective voting rights. Electronic voting is not mandatory at the general meeting itself, however, the shareholder must have the possibility to electronically transfer proxies and instructions to the independent proxy before the general meeting takes place.

## Mandatory Adjustments of the Articles of Association

The ordinance provides that the articles of association must contain certain additional information such as the duration of the employment contracts of the members of the management or the number of positions of the members of the board of directors, the management and the advisory board held with companies outside the group which have to be registered with the commercial register. In addition, the articles of association will have to include the approximate amount of credit, loans and retirement benefits as well as the principles of performance-related compensation for the members of the board of directors, the management and the advisory board in order to be binding.

## New Rules for Pension Funds

In the future, the Swiss regulated pension funds must exercise the voting rights pertaining to the shares held by them directly. The votes must be cast in the interests of their members. According to the explanatory report, this requires that the pension funds are registered as shareholders with voting rights in the share register of the respective companies. According to the ordinance, the voting obligation does not apply absolutely, but allows pension funds to abstain from a vote or to completely refrain from voting if this is in the interest of the members.

The superior body of the pension fund shall define the principles on voting in regulations.

The pension funds must disclose to their members how they voted in an annual summary report.

## Criminal Law

Intentional violations of the new provisions are subject to criminal sanctions as stipulated in article 95 paragraph 3 of the Federal Constitution. The criminal sanctions for members of the board of directors, the management and the advisory board may result in imprisonment of up to three years and a fine of up to the amount of six years' annual compensation payments. Negligent violations of the new provisions are not punishable. Members of the superior body of a pension fund or its management will be punished with a fine of a maximum of 180 daily penalty units in case of negligent violations of the voting and disclosure obligation.

## Transitional Rules

The ordinance sets a high pace. Upon its entry into effect, the provisions on the prohibited compensations, on the election of the members of the board of directors and of the compensation committee, the criminal provisions, among others, are immediately applicable. Existing employment contracts will have to be amended within one year, otherwise the provisions of the ordinance apply automatically. Pension funds will also have to amend their regulations and processes within one year. The articles of association will have to be amended within two years. Eventually, the authorization provisions relating to the compensation of the members of the board of directors, the management and the advisory board are applicable as of the ordinary general meeting of 2015, or from the second ordinary general meeting after the entry into effect of the ordinance.

## Next Steps

The general consultation process on the Draft Ordinance with political parties, umbrella associations of the Swiss economy and other organizations will end on 28 July 2013. Bär & Karrer will also participate.

The definitive version of the Ordinance is expected to be published by the Swiss Government in November 2013 and to enter into force on 1 January 2014. The Ordinance will stay in force until Swiss Parliament passes legislation to implement the Minder Initiative which is unlikely to happen before 2016.

As mentioned in the introduction, the implementation of Art. 95 para 3 of the Federal Constitution in the draft Ordinance seems to be well-balanced and practical in large parts. However, Swiss listed companies will have a lot to do to comply with the new regulatory framework in time.

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