"controls" the voting rights with respect to the shares, independent of the legal status (ownership or beneficial ownership) with respect to them.

In practice, the question may now arise as to whether nominees who have previously based their disclosure practice on article 9(2) SESTO-FINMA will have to temporarily change their practice in light of the Federal Supreme Court's decision and will then have to come back to their current disclosure practice once the proposed article 110(2) FMIA is in effect. However, since the Federal Supreme Court admitted that there are situations where the extent of discretion with respect to the exercise of voting rights could qualify as an indirect acquisition in the meaning of article 9(3)(d) SESTO-FINMA, it is advisable that the nominees analyze the extent to which they are entitled to exercise voting rights and factually "control" the holding positions. In case of doubt, the nominees should request a recommendation from the DO as to the extent of their disclosure duties. However, in so far as the nominee legally or factually fully controls the shares, *e.g.* where the voting rights are freely exercised and where even all investment decisions are taken by the nominee, the Federal Supreme Court's decision does not change the current legal situation in the authors view, a view also implied in the commenting report of the Federal Council that was published simultaneously with the draft FMIA, and it will not change by implementation of the proposed article 110(2) FMIA.

*Benjamin Leisinger (benjamin.leisinger@homburger.ch)*

## Alternatives and Trends on the Binding Vote on "Say on Pay"

Reference: CapLaw-2014-2

In CapLaw-2013-14 the editors of CapLaw commented on the draft ordinance (the Draft Ordinance) for the implementation of the constitutional initiative against excessive compensation (the Minder Initiative). Following the end of the consultation period for the Draft Ordinance, the final version of the "Ordinance against Excessive Compensation in Listed Companies" (*Verordnung gegen übermassige Vergütungen bei börsenkotierten Gesellschaften; VegüV*) (the Ordinance) was published on 20 November 2013 and entered into force on 1 January 2014. This article comments on one of the key aspects of the new rules: the "say on pay", i.e. the shareholders' vote on executive compensation.

*By Daniel Raun/Thomas Reutter*

### 1) Binding vote on executive compensation

One of the centerpieces of the Minder Initiative is the introduction of "say on pay" for the shareholders of Swiss listed companies. The compensation for the board of direc-

tors, the executive management and the advisory board, if applicable, will in the future be subject to a binding vote by the shareholders at the annual general meeting. Companies that are subject to the new provisions therefore face the task of conforming, among others, their articles of incorporation to the new statutory regime.

### 2) Transitional period

The Ordinance sets out transitional periods for the implementation of the new restrictions, including for any amendments of the articles of incorporation, which must be resolved at the 2015 annual general meeting at the latest. However, as was already pointed out in CapLaw-2013-14, p. 4, it may be prudent for companies not to wait until 2015 but to propose such amendments to the shareholders at this year's annual general meeting already. Given that the amounts of compensation will have to be put to the shareholders' vote for the first time in 2015, the revision of the articles of incorporation in 2014 would provide certainty as to the applicable voting procedure (see 3) below). Furthermore, adapting the articles of incorporation ahead of 2015 has the advantage that any further changes, which may become necessary as a result of the shareholders rejecting some of the proposals in 2014 or otherwise, could be put on the agenda of the 2015 annual general meeting. It appears that indeed a majority of the companies share this view and have decided to revise their articles of incorporation in 2014 for these reasons.

### 3) Voting mechanism

#### a) No default voting mechanism

One of the most notable differences of the Ordinance compared to the Draft Ordinance concerns the vote on executive compensation. In the absence of any provisions in the articles of incorporation, under the Draft Ordinance a prospective vote on each of the board of directors' and the executive management's (and, if applicable, the advisory board's) fixed compensation for the period until the next annual shareholders' meeting and a retrospective vote on the variable compensation for the previous financial year would have applied. While the core principles established by the Draft Ordinance in respect of the shareholders' "say on pay" remained unchanged, the Ordinance does no longer provide a default voting mechanism. Consequently, companies will in any case have to specify in their articles of incorporation the procedure of the vote on executive compensation. Failure to do so could lead to criminal liability of the members of the board of directors under the criminal sanctions of the Ordinance.

#### b) Statutory principles and available voting mechanisms

In specifying the procedure for the vote on the executive compensation, companies need to observe certain standards set out in article 18 (3) of the Ordinance. First, the executive compensation must be put to the shareholders' vote annually. Second, the

compensation must be approved separately for the board of directors, the executive management and, if applicable, the advisory board (but in each case only on an aggregated basis). Third, the vote must be binding (though companies may on a voluntary basis provide for a consultative vote which is in addition to the votes mandated by the Ordinance; see c) below).

There are two basic concepts how executive compensation can be put to vote. A ***retrospective vote*** allows shareholders to approve the remuneration actually awarded. By contrast, in a ***prospective vote*** shareholders set maximum amounts ("caps"; "budget") for future periods. Additionally, the articles of incorporation will have to specify for which reference period the compensation shall be approved. While a retrospective vote with reference to a period other than the preceding business year would seem unusual, there are a number of conceivable options if a company opts for prospective voting. The three alternatives most commonly discussed are the period from one annual general meeting to the next, the current business year or the next business year (though other reference periods are likewise permissible, e.g. midyear to midyear). Companies are free to use different reference periods for the fixed compensation and the variable compensation and for the board of directors and the executive management (and the advisory board), respectively. The articles of incorporation may further provide for the approval by the shareholders of one amount comprising both the fixed and variable compensation if the reference periods are the same (the vote on only one amount for incongruent periods seems impracticable), or of two separate amounts.

### c) Trends and guidance

As mentioned in 2) above, most companies intend to propose to their shareholders the revision of the articles of association at this year's annual general meeting. In view thereof, fund managers and independent proxy advisors such as zCapital, SWIPRA and, most recently, Ethos have issued guidelines which provide guidance as to which voting mechanisms would be deemed to fulfil the key criteria set by such organizations. Based on these criteria, a combination of a prospective vote on fixed compensation with a retrospective vote on variable compensation is generally approved of. However, SWIPRA has pointed out in its position paper that a retrospective vote on remuneration paid under a long term incentive program (LTIP) would not take account of the fact that amounts paid under LTIPs do not aim to compensate for past performance but to incentivize future performance. Consequently, SWIPRA considers a mechanism which provides for a retrospective vote only with respect to short term bonuses more appropriate. Ethos takes the same view but for a different reason: it argues that the criteria for short term (annual) bonuses often constitute sensitive information which cannot be made public in advance to the extent that would be necessary to achieve the degree of transparency required for a prospective vote. In any case, Ethos favors a vote that separates fixed from variable compensation.

As an alternative to having the shareholders approve the variable compensation (or parts thereof) in a binding retrospective vote, companies may choose to combine a prospective (binding) vote on the entire remuneration, both fixed and variable, with a retrospective consultative (i.e. non-binding) vote on the compensation report (*Vergütungsbericht*). Both SWIPRA and zCapital accept that there may be legitimate reasons why a retrospective vote could be deemed inappropriate and that a consultative vote, though not binding, may nonetheless be an effective means for shareholders to express their views.

Even though many companies (and their legal advisors) have not yet concluded the process of drafting the necessary amendments to the articles of incorporation which they intend to propose to the shareholders, it appears that a majority will opt for the prospective approach. In light of the views described above, it is expected that in most companies' annual general meetings there will also be a consultative vote on the compensation report (which may not be reflected in the articles of association). Further, there is also a preference that the prospective vote be with reference to the following business year. There seem to be relatively few companies in favor of a vote in relation to the current business year or the period between two annual general meetings (or, in exceptional cases, yet another reference period). Finally, current trends suggest that one vote for both the fixed and variable compensation will be the predominant choice, though by comparison to the aforementioned decisions it is arguably of much less consequence whether one vote or separate votes are held.

*Daniel Raun (daniel.raun@baerkarrer.ch)*
*Thomas Reutter (thomas.reutter@baerkarrer.ch)*

## Prohibited Compensation Payments under the Minder Ordinance (VegüV)

Reference: CapLaw-2014-3

The ordinance implementing the Minder Initiative also introduces new criminal offenses in connection with certain specific and now illicit compensation payments to certain senior persons associated with a listed company. The affected compensation payments encompass: severance payments, payments in advance and commissions for certain M&A transactions. This article endeavors to shed more light on scope and consequences of such prohibited payments.

*By Thomas Reutter/Daniel Raun*