

Newsletter

# Special Edition

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**Minder initiative approved** On 3 March 2013, the Swiss voting public approved the fiercely debated «rip-off initiative» launched by Thomas Minder in 2008 (the «Minder Initiative»). The shareholders of Swiss public companies will be able to decide on the aggregate compensation of the board of directors (the «Board») and the executive management. Members of the Board and the executive management will no longer be entitled to advance compensation payments, golden parachutes and similar payments. In addition, new election procedures for the Board and the executive management will be introduced. The articles of incorporation (the «Articles») will have to include specific rules on compensation matters. Any violation of these new corporate governance rules will be subject to criminal sanctions. Swiss public companies face a challenge to accommodate the outcome of the ballot.

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# New Corporate Governance Rules for Swiss Public Companies

On 3 March 2013, the Swiss electorate approved the Minder Initiative, which will fundamentally change the legal framework on executive compensation and other corporate governance matters for Swiss public companies. The implementation of the Minder Initiative will be the task of the Federal Council and the Swiss Parliament. While many aspects around such implementation will remain unclear for the months and years to come, the new rules will definitely require substantial changes to the Articles and other company documents.



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## Requirements of Minder Initiative – New Paragraph 3 of Article 95 of Swiss Federal Constitution

According to the Minder Initiative, introducing a new paragraph 3 of article 95 of the Swiss Federal Constitution («FC»), Swiss (and only Swiss) companies whose equity securities are listed on a Swiss or foreign stock exchange need to brace themselves for the following key changes:

### Say-on-Pay

The general meeting of shareholders («GM») shall vote on the aggregate compensation amount of the Board, the executive management and the advisory board (*Beirat*). Such vote is mandatory and binding. Severance or «other» compensation payments, advance payments, transaction incentive payments to members of the Board or the executive management are prohibited. Additional consulting or employment agreements with such members are no longer permitted either.

### New Election Procedures

The GM shall elect the chairman of the Board, and, individually, each Board member as well as each member of the compensation committee. The GM shall further elect the independent proxy (*unabhängiger Stimmrechtsvertreter*). Representation by the corporate proxy (*Organvertreter*) or the depositary proxy (*Depotstimmrechtsvertreter*) shall

no longer be permitted. Electronic voting by shareholders shall be allowed. Pension funds must cast their votes in the interest of the insured and disclose how they voted.

### Additional Specific Rules in the Articles

The Articles shall include specific compensation rules, in each case covering both the members of the Board and the executive management, concerning the following items: (i) the amount of loans, credit facilities and post-retirement benefits; (ii) bonus schemes and compensation plans; and (iii) number of mandates outside the group. The duration of employment agreements with the executive management needs to be addressed in the Articles as well.

### Criminal Sanctions

Any violation of the new rules shall be sanctioned with imprisonment of up to 3 years and a fine of up to six times the annual compensation.

### Entry Into Force – Uncertainties around the Implementation

The Federal Council and the Swiss Parliament must adopt the legislation implementing article 95 paragraph 3 FC. The new article 197 paragraph 8 FC requires the Federal Council to implement the Minder Initiative within one year from now by means of an ordinance (*Verordnung*). Such ordinance will govern the subject matter at least temporarily until the Swiss Parliament will adopt the respective implementing legislation, which however remains subject to a

(in this case generally considered rather unlikely) facultative referendum. It is assumed that a first draft of the Federal Council's implementing ordinance will be available to the public in late summer 2013. We expect entry into force to occur on a date which will unlikely affect the 2014 GM season.

The details of such ordinance are not yet known. However, companies should expect the implementing rules coming from the Federal Council to closely follow the wording of the Minder Initiative, more closely than what a minority of legal literature has recently suggested. By contrast, the legislation procedure in the Swiss Parliament is less predictable and, at least from a political point of view, the Swiss Parliament is in a better position to deviate from the Minder Initiative. Although most experts consider the wording of article 95 paragraph 3 FC rigid and leaving little room for loopholes, there have already been debates as to whether the legislator must implement the Minder Initiative by way of mandatory law or if it can enact (optional) rules, from which a company could deviate by shareholder approval. The argument for this flexibility is made in reference to the purpose clause in article 95 paragraph 3 FC, which appears to suggest that all of the changes dictated by the Minder Initiative are to be understood as principles allowing for exceptions.

In any case, many details remain unclear, such as the requirement of the GM to annually resolve on the amount of total compensation of the Board, the executive management and the advisory board. The Minder Initiative gives no answer as to whether there shall be one single resolution for all three categories

of recipients or three separate resolutions. Furthermore, it is not clear at all whether the GM shall resolve on the compensation *ex ante* or *ex post* or whether one part of the compensation shall be approved *ex ante* and the other part *ex post*. In addition, it is uncertain what happens if the shareholders reject the proposed compensation. Moreover, in regard to the restriction to receive severance or other payments, it is being discussed to which extent the companies may change employment agreements (e.g. by extending the notice period), thereby circumventing said restrictions. Further, there is room for interpretation of the pension funds' obligation to cast their vote in the interest of the insured, such as how abstentions are to be dealt with.

The implementation of the criminal sanctions also raises several questions. As a general concern, a criminal sanction in respect of a failure to comply with private law is *per se* problematic. While the text of article 95 paragraph 3 lit. d FC is detailed and narrow, it nevertheless remains unclear from a criminal law perspective what public good should be protected by the sanction (e.g. individual assets or the viability of the financial centre?) and, more importantly, who would be subject to the sanction (only Board members?).

#### **To Dos for Swiss Public Companies**

After years of heated discussions, the Minder Initiative has finally been approved, an initiative which many continue to consider as too far-reaching and inflexible. In any case, Swiss public companies will be challenged to adopt the new regime and take the necessary steps to align internal policies, regulations and other relevant documentation with the new rules. More specifically, companies will have to amend their Articles to reflect the new election procedures and adopt the additional rules regarding compensation and governance matters. In addition, the new say-on-

pay regime and the new election procedures will have a significant impact on the planning, processing and execution of GMs (e.g. adjust the respective standard documentation, invitation, power of attorney, chairman's script, etc.).

As the Minder Initiative is not a finalised set of rules and its implementation will need to pass through the Federal Council and the Swiss Parliament, companies affected by the Minder Initiative should resist rushing into any (premature) modifications, but stay alert and carefully monitor the upcoming legislative processing of the Minder Initiative by the respective governing bodies. We assume that the initial guidance will at least to some extent deviate from the draft ordinance, which is expected to be published within the next few months. It may nevertheless be advisable to establish working groups now with the task to review and assess the current corporate governance related rules and policies with the aim to identify the scope of changes potentially required by the upcoming new legislation.

We will continue covering important developments on this topic. If you have any related comments or questions, please contact [news-minder-initiative@walderwyss.com](mailto:news-minder-initiative@walderwyss.com).

Save the date: Roundtable on «Minder Initiative – Timing and To Dos» on 14 May 2013, from 5:30 p.m. – 7:00 p.m. Invitation to follow.

Thank you.

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