

Newsletter

Special Edition

Draft Ordinance on Minder Initiative: No groundbreaking rules; interesting clarifications. End of June, the Swiss Federal Council published its preliminary draft ordinance on the Minder Initiative («DO-Minder»). Overall, it presents a well-articulated draft reflecting the most important parameters of article 95 para. 3 of the Swiss Constitution (Minder Initiative). The DO-Minder does not blindly follow the wording of the Minder Initiative but also provides important deviations and clarifications, along with a few surprises. Swiss public companies should now start reviewing governance and compensation issues sensibly and in light of their particular needs and the flexibility provided under the DO-Minder framework.

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Minder and Federal Council on the Same Page

Given the clear message sent by the Swiss voters on 3 March 2013 and, as a general observation, the ongoing shift in the corporate governance landscape towards increased shareholders' rights, it is no surprise: the implementing rules proposed by the Federal Council follow in essence what Minder and the Swiss voters are demanding. Interested parties have been invited to comment as part of the general consultation process (*Vernehmlassung*). The Federal Council is moving at an accelerated pace and plans for the definitive ordinance to become effective on 1 January 2014. Below we review the most important proposals and what we see as the key questions arising under the DO-Minder.



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Key Elements

Say-on-Pay

As for Say-on-Pay, the DO-Minder proposes a very flexible regime (to be set forth in the articles of incorporation («Articles»)). As long as the general meeting of shareholders («GM») is *annually* provided with a *separate and binding* vote for each of the board of directors («Board»), the executive management and the advisory board (if any), basically all options and combinations are available. The vote can cover prospective (e.g. until the next GM) and retrospective (e.g. covering the preceding business year) compensation, and there can be a split between variable and fixed compensation, covering different periods. Accordingly, a «budget» can also be approved from which the Board can fund compensation for a period of time (up to one year). If foreseen in the Articles, the Board is also free to pay a fixed salary for managers appointed *subsequent* to the respective GM, without such amount being specifically pre-approved by the GM.

Clarifying a debated issue, in case of a rejection by the GM, the Board would get a second shot with an adjusted proposal (which may be put up for vote at the same GM). If rejected again, the Board has to call another GM with regard to this agenda item within 3 months. The crucial point here will be how the proxies are drafted concerning such «ad hoc proposals» by the Board. An open question remains as to the actual nature of

the GM's competence. At least the wording used in the DO-Minder («votes»; «stimmt») could suggest that the GM's power is not limited to a mere approval of the Board proposal but would allow the GM to make specific counter-proposals.

In line with the Minder Initiative, severance or «other» compensation payments, advance payments, transaction incentive payments to members of the Board or the executive management are prohibited. Although sign-on bonuses (e.g. as compensation for forfeited benefits originally granted by the former employer) would remain allowed, the Federal Council recognises a misuse potential and decided to leave the final call on this issue to the Swiss parliament.

A new element is the separate compensation report, the content of which would reflect the information required under article 663b^{bis} CO. Formally, such separate compensation report would not be subject to GM approval but fall under the scope of the auditors' review.

New Election and Voting Procedures

Just like under the Minder Initiative, under the DO-Minder the GM shall elect the chairman of the Board («Chairman») and, individually, each Board member as well as each member of the compensation committee. The GM shall further elect the independent proxy representative (*unabhängiger Stimmrechtsvertreter*); such independence would be

determined in accordance with article 728 CO (the independence provision for the auditors). Around these points, the DO-Minder reveals one sensible solution, and one new feature: the DO-Minder would let the GM elect substitutes for the Chairman and the independent proxy representative, which in our view is a reasonable approach to *ex ante* remediate governance gaps in case of possible vacancies. As for the independent proxy representative, the DO-Minder clarifies that the shareholders must have the possibility to give general voting instructions in case of new (ad hoc) proposals (*Anträge*). In addition, the DO-Minder further determines that proxies sent back *without* any instructions (which, in practice, is actually surprisingly often the case), are to be calculated as *abstentions*. Yet, whenever the absolute majority rule applies (which is the default rule under article 703 CO), such abstentions are effectively «no» votes. Against that background, we take the view that as long as proxies *explicitly clarify* that if proxies are duly executed but sent back without any box being ticked, such voting rights would be deemed exercised in the manner described in such proxy (e.g. supporting the Board proposal).

Furthermore, the DO-Minder confirms that in the future electronic voting by shareholders would be allowed, while corporate proxy (*Organvertretung*) and depositary proxy (*Depotstimmrechtsvertretung*) will no longer be permitted. While very unclear under the Minder Initiative, pension funds must make use of the voting rights in the best interest of the insured, but – as now clarified by the DO-Minder – are also allowed to *refrain* from exercising shareholders' rights. Furthermore, the pension funds have to disclose their voting behaviour no later than the calendar year which follows the GM, which could be almost 2 years after the GM. This deviation from what at least Minder had aimed to

achieve (mandatory involvement of the pension funds and full and imminent transparency) is perhaps the most significant setback which Minder would suffer, if this flexibility finds its way into the definitive ordinance. At the same time, it is a most welcome aspect from an *economic* point of view.

Additional Specific Rules in the Articles

The mandatory content of the Articles substantially reflects what was asked for under the Minder Initiative (e.g. amount of loans, credit facilities and post-retirement benefits, duration of employment agreements with members of management). The DO-Minder has added additional topics which in the future will have to find their place in the Articles as well (e.g. tasks of the compensation committee, fixed salary for managers appointed subsequent to the respective GM).

Criminal Sanctions

While still not appropriate by any standard, the Federal Council sticks to the pre-settings of the Minder Initiative when it comes to criminal sanctions. Intentional non-compliance with almost any of the rules under the DO-Minder by the relevant corporate bodies can be sanctioned with imprisonment of up to 3 years and a fine of up to six times the annual compensation. Newly introduced are the 180 daily penalty units as potential sanctions if members of the management or the superior body of pension funds are in breach of the voting or disclosure duties. The DO-Minder characterises the criminal offences as prosecutable *ex officio*.

Entry Into Force – Staggered Process

The Federal Council plans for the definitive ordinance to become effective on 1 January 2014. Assuming no extension is introduced in the definitive version, the rules on elections of the Chairman, the other members of the Board and of the compensation committee will have to be complied with at the first ordi-

nary GM in 2014. Under the DO-Minder, the Articles and organisational regulations will have to be amended within two years following the entry into force of the definitive ordinance. If understood correctly, this would still allow the election of the Chairman at the 2014 GM, even though this power would in most cases still be with the Board under the then applicable Articles. For the 2014 GM, the independent proxy representative may still be designated by the Board. Proper Say-on-Pay regimes covering *fixed* compensations will have to be in place at the second GM following the entry into force of the definitive ordinance (i.e. for the GM 2015). Say-on-Pay for *variable* compensation will apply for the first business year beginning as of or after the entry into force of the ordinance (i.e. at the GM 2015).

To Dos

The definitive ordinance is expected to be issued only in November 2013. Considering the very tight schedule set by the Federal Council, Swiss public companies should now start reviewing governance and compensation issues that legally fit into the DO-Minder framework. Swiss issuers should be aware that the DO-Minder has clear boundaries, but it is also filled with rules that grant useful flexibility. The best course for Swiss public companies will be to take advantage of these opportunities, allowing the GM to adopt thoughtful corporate governance and compensation rules without impairing competitiveness.

Save the date: **Workshop** on «Implementing the Minder Initiative – Practical Considerations» on 26 November 2013, from 5:30 p.m. – 7:00 p.m. Invitation to follow.

We will continue covering important developments on this topic. If you have any related questions, please contact news-minder-initiative@walderwyss.com.

Thank you.

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