# Client Memorandum

March 2013

## Consequences of the acceptation of the Minder initiative

This Newsflash discusses the consequences of the acceptation of the so-called "Minder initiative" (the "Initiative") by the Swiss people and cantons on the occasion of the popular vote that took place on 3 March 2013.

The Initiative introduces two paragraphs in the Swiss Federal Constitution. The text sets forth relatively general principles on certain issues regarding Swiss listed companies. It does not contain a detailed legislative framework. The amendments to the Swiss company law that the Swiss Parliament had adopted in March 2012 (the so-called "indirect counter-proposal"), which contained detailed regulations of the topics covered by the Initiative, have become moot as a result of the 3 March 2013 popular vote.

The new provisions of the Federal Constitution introduced by the Initiative still need to be put into law as they are not directly applicable. The meaning of several of the new requirements is debatable. Their exact scope and consequences are yet to be determined on several key points (see II below).

### I. Timing of implementation

Further to the acceptation of the Initiative, the Federal Council will have to submit a draft of the implementing legislation to the Swiss Parliament. The draft will then have to be adopted by both houses of the Parliament before it can eventually enter into force. The process is likely to take several years.

The Initiative mandates, however, the Federal Council to implement its requirements by executive decree within one year from the popular vote (*i.e.* until 3 March 2014). This temporary regime will remain effective until the relevant legislation enters into force. It will have to determine, among other things, the time period within which listed companies will be required to adapt their articles of association and internal regulations to the new regime. Action is likely to be required in this respect on the occasion of the 2015 general meetings. While the Initiative will bring a number of restrictions on remuneration practices, it does not provide for or require a cap on executive pay.

### II. The Initiative's requirements

The Initiative's requirements are the following:

**1. Mandatory election by the shareholders of:**

- **the chairman of the board;**
- **the members of the remuneration committee; and**
- **the independent representative of shareholders (independent proxy)**

Under current Swiss law, directors are elected by shareholders, but the chairman is generally appointed by the board. The board is also responsible for appointing the members of the remuneration committee and the independent proxy.

2. **Mandatory one-year terms for all board members**

3. **Prohibition of certain forms of remuneration, *i.e.*:**

   - **severance and "other" payments;**
   - **advance compensation payments; and**
   - **payments related to the acquisition or disposal of companies.**

   **Prohibition for members of the company's corporate bodies to be employed or mandated by other group companies.**

   What these prohibitions cover exactly is currently debated. The Parliament's counter-proposal was distinguishing "advance compensation" (which were subject to shareholder approval with a supermajority requirement) and "sign-in bonuses" (which only had to be disclosed). It is unclear whether the rules implementing the Initiative will make a similar distinction.

   Although the Initiative does not define the term "corporate bodies", it relates in principle to the board, management team and advisory committees. The prohibition from employment by group companies should consequently not extend to other group employees.

4. **Obligation to include provisions in the company's articles of association relating to:**

   - **bonus and equity plans of directors and officers;**
   - **loans, credits and post-retirement benefits granted to directors and officers;**
   - **the number of outside mandates of directors and officers; and**
   - **the duration of the employment agreements of the members of the management team**

   The level of specificity that will be required from the relevant provisions is uncertain. It seems reasonable to assume that the regime that will ultimately be put in place will be similar to the one that was contemplated in the Parliament's counter-proposal, *i.e.* a regime where the compensation system is described in general terms in the articles of association, and where the specific remuneration packages are subject to the annual shareholder vote imposed by the Initiative (see 5 below).

5. **Annual binding shareholder vote on the aggregate remuneration of the members of the board, management team and advisory committees**

   Uncertainty remains on the manner in which this requirement will eventually be implemented. Separate votes on the base and variable remunerations are likely to be required (with a prospective vote for base remuneration and retrospective vote for variable remuneration), as this was contemplated in the Parliament's counter-proposal. The characterisation of "base" or "variable" remuneration may however be difficult for certain incentive schemes. The details of the implementing regulations will be decisive in this respect.

   Another area of uncertainty relates to the consequences of a rejection by shareholders of the board's remuneration proposals. Since the shareholder vote is necessarily binding, the company may be unable to remunerate its directors and officers until a new shareholder meeting has been held. It remains to be seen how this problem will be dealt with.

6. **Prohibition of corporate and custodian proxies**

   Under the new regime, shareholders will be given the choice to attend a general meeting in person, to appoint a proxy of their choice, or to instruct the independent proxy appointed by the shareholders (see 1 above). The Company itself will no longer be allowed to receive proxies from shareholders. Also, custodians will only be allowed to exercise voting rights on behalf of their clients if they are specifically instructed to do so.

7. **Prohibition of delegation of management responsibilities to a body corporate**

8. **Ability for shareholders to exercise their votes by electronic means without being required to attend the general meeting**

   Unlike the Parliament's counter-proposal (which only permitted votes to be cast electronically under certain conditions), the Initiative requires that shareholders

be allowed to cast their vote remotely under all circumstances. Systems making it possible to carry out such votes without risks of fraud or unauthorized participation seem however not to be generally available yet. The details of the rules implementing the Initiative will consequently be decisive in this respect. It remains in particular to be seen whether the regime that will ultimately be adopted will contemplate the grant of proxies by electronic means, the holding of virtual, on-line, general meetings, or both.

**9. Requirement for all Swiss pension funds to exercise their voting rights in the interests of the persons insured and to disclose their votes**

**10. Criminal prosecution in case of breach of the requirements of the Initiative**

The details are expected to become part of the new legislation.

## III. Actions to be taken

The articles of association of Swiss listed companies will eventually have to be amended to implement the regime resulting from the acceptation of the Initiative. Changes are however unlikely to be required until the 2015 AGM.

Of the various requirements of the Initiative, the one with respect to which action in the short term is in particular advisable relates to the remuneration structure. The actions required involve:

- reviewing the remuneration regime applicable to the company's board and management team to identify forms of remuneration that will potentially be prohibited;
- preparing for adjusting the remuneration packages to the new requirements; and
- preparing general remuneration principles, to be eventually inserted in the company's articles of association.


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