Final rules announced on executive pay and corporate governance (Minder Initiative) for listed Swiss companies

Introduction

The final Ordinance implementing the Minder Initiative, as well as its Explanatory Report, were published on 20 November 2013. The final Ordinance offers certain clarification on various hotly-debated outstanding questions surrounding the implementation of the Minder Initiative adopted by the Swiss electorate in March 2013. The final Ordinance provides that the new law enters into force as of 1 January 2014 and will remain in force until the Swiss Federal Parliament enacts all the provisions needed to implement the Minder Initiative into law. The provisions apply only to Swiss companies limited by shares whose shares are listed on a Swiss or foreign stock exchange.

This Alert outlines the key changes in the final Ordinance when compared to the provisions of the draft Ordinance published in June 2013. This Alert also outlines the next steps for companies to assist with the implementation of the Ordinance.

What are the key implications of the final Ordinance?

Prohibited remuneration

The prohibition on severance payments, payments in advance and commissions for acquisitions or transfer of enterprises from 1 January 2014 are confirmed in the final Ordinance.

The final Ordinance clearly states that sign-on or starting bonuses are permitted. There is also some clarity regarding severance payments in that the prohibition applies only where a payment is made under contract or provided in the articles of association, but not where such a payment arises as a matter of law. The prohibition on severance payments will not apply in instances for payments made during a notice period to satisfy compensation entitlements under the employment contract.
Related matters addressed by the final Ordinance include that the notice periods for indefinite contracts and the term of any fixed term contracts for both the board of directors and executive board must not exceed one year. The period or term selected must be included in the articles of association. Further, the period within which contracts of employment need to be amended for compliance with the final Ordinance has been extended to the end of 2015.

Vote on compensation by the general meeting

To provide maximum flexibility, the final Ordinance requires that all covered companies specify in their articles of association the approach to binding shareholder voting on compensation approval from the 2015 general meeting. The approval has to be given on the aggregate compensation of the board of directors, advisory board and executive board, but there is no longer a requirement for prospective and retrospective voting. The following conditions must still be met cumulatively:

- The general meeting votes annually on the aggregate compensation
- The general meeting votes separately on the aggregate compensation for the board of directors, advisory board and executive board
- The vote of the general meeting has a binding effect.

There is also no longer a default requirement as was the case in the draft Ordinance which distinguished between fixed and variable compensation. Further, the outcome of a “no” vote and the subsequent resubmission (either at that general assembly or an extraordinary general meeting) for approval is no longer specified in the Ordinance, rather the approach must be specified in the articles of association.

The ability to specify in the articles of association additional compensation for executives hired after the compensation vote at the shareholders general meeting has been retained. However, where the general assembly votes prospectively on the compensation for the executive board any additional compensation for an interim hire can only be paid if any pre-approved compensation amount is insufficient.

Compensation report

The board of directors is required to prepare an annual written compensation report to be presented at the general meeting. In terms of content, the final Ordinance will replace the disclosure requirements in the “transparency law” of Art. 663b bis Swiss Code of Obligations (CO), such that disclosure which was previously contained in the notes to the financial statements will now be required in the compensation report. In addition, the new accounting law provisions, which have been in force since 1 January 2013, must be applied. These requirements will apply in relation to the financial year starting on or after 1 January 2014.

Criminal law provisions

The criminal law provisions have been revised and some criminal offences are more specific or have been dropped. Any member of the board of directors, the executive management or the advisory board who receives or pays any prohibited payments is punishable by imprisonment up to 3 years and monetary penalties. Further, members of the board of directors are punishable by imprisonment of up to 3 years or monetary penalties for a breach of the listed offences.

An offender will need to have acted with direct intent to breach the applicable provisions of the final Ordinance.

Voting requirements

Some additional detail is provided regarding the requirements for companies to ensure that shareholders can cast their votes by instructing the independent proxy electronically from 2015. The term independence is clarified. Further, a removal of the independent proxy is only permitted at the end of a general meeting rather than at any time. Proxies and instructions are only allowed for the next general meeting, continuing proxies and continuing instructions are not permitted. A certified electronic signature is not necessary for an electronic granting of proxies or instructions.
Pension funds voting requirements are also clarified, including mandatory voting on certain agenda items, i.e. on the election of members of the board of director and its chairman, the members of the compensation committee and the independent proxy, total compensation voting and changes to the articles of association. The voting obligation is also newly applicable to indirectly held shares, if the pension fund has a right to vote or if the direct holder of the shares is controlled by the pension fund. Further, pension funds may abstain from voting with regard to a determined agenda item but not refrain generally. In addition, the reporting duties have been tightened in case of abstention of voting and rejection of a motion of the board of directors. Pension funds can meet the requirement to vote in the interests of insured members where the sustainable development of the pension fund is served.

The final Ordinance clarifies that there is no need to elect a substitute for the members of the chairman of the board of directors, the members of the compensation committee or the independent proxy. Instead and unless the articles of association provide otherwise, the board of directors can designate a substitute for the period up to the next general meeting.

Next steps
Affected companies need to take action over the coming weeks and months, which includes the following recommended steps:

▶ Determine an implementation timeline for the company, including any items that might be implemented earlier than required
▶ Seek amendment to the articles of association including to reflect the shareholder compensation voting approach
▶ Determine the approach for the shareholder compensation vote, including the applicable period(s), the approach to valuation and disclosure of variable compensation, and the extent business targets are disclosed
▶ Determine the location and level of detail that information regarding the shareholder compensation vote will be disclosed – consider disclosure in the compensation report, the general meeting notice/invitation and in any supporting documents
▶ Review contractual compensation documents to ensure prohibited payments and notice periods are aligned with the new law

Contacts
Daniel Bachmann
Legal Partner
daniel.bachmann@ch.ey.com
+ 41 58 286 6431

Kevin Cornelius
Tax Partner
kevin.cornelius@ch.ey.com
+41 58 286 5678

Roger Müller
Assurance Partner
roger.mueller@ch.ey.com
+ 41 58 286 3396

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