The independent voting proxy - adjustments in light of the Minder-Initiative

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1. Introduction
With the adoption of the “Minder” Initiative and the accompanying changes to the Federal Constitution (introduction of the new Art. 95 para. 3 of the Federal Constitution), which are primarily directed towards compensation systems at public companies, new rules are also to be introduced in the context of institutional voting proxies. The implementation of these new rules is initially being effected at the ordinance stage, with the final version of the Ordinance against Excessive Compensation for Publicly Listed Companies (“OaEC”) only being available since 20 November 2013.

2. Institutional Voting Proxies in the Swiss Code of Obligations (“CO”)
Under current law, there are three sub-types of institutional voting proxies:
- Corporate proxies pursuant to Art. 687c CO, which serves to institutionalise voting proxies for registered shares. In this context, for shareholders who wish to be represented, a member of one of the corporate bodies or another dependent person from the board of directors is proposed as proxy to those shareholders. At the time the discharge is granted, the corporate proxy is excluded from voting with regard to his own or any shares represented by him given his lack of independence vis-à-vis the board of directors (this even applies if he has received voting instructions from shareholders in connection with the resolution concerning the discharge).
- Because the corporate proxy is in a relationship of dependency to the company, the latter must always designate an independent person as proxy, pursuant to the requirement set forth in Art. 689c CO (the independent voting proxy, cf. below, in Section 3).
- The proxies of deposited shares (Art. 689d CO) is a banking institution or professional asset manager who exercises the participatory rights of the shares deposited with him on behalf of their depositors. The law explicitly sets forth how the proxy of deposited shares must conduct himself in the absence of specific instructions on the part of the shareholder: He must adhere to the shareholder’s general instructions; if no such instructions have been provided, he must follow the recommendations of the board of directors. This solution was, however, subject to some criticism in the past, given that it does not necessarily correspond to the will of the shareholders.

3. Independent Voting Proxies under the OaEC
3.1 New Rules
The scope of application of the OaEC encompasses corporations that are subject to Swiss law and have their registered office in Switzerland, and whose shares are publicly listed on a Swiss or foreign stock exchange. Art. 8 et seq. of the OaEC contains provisions governing independent voting proxies, which must mandatorily be applied by the companies. Whereas the law previously...
allowed institutional voting proxies in the form of both corporate proxies and proxies of deposited shares, in the future solely independent voting proxies will be allowed with respect to both registered and bearer shares of companies subject to the OaEC (this is explicitly set forth in Art. 11 of the OaEC). In addition to the independent voting proxies, however, discretionary voting proxies (e.g. proxies granted to a befriended shareholder) will continue to be permissible. Worth noting is that the rules in force until now under the CO will continue to apply to all companies not subject to the OaEC.

The annual election of an independent voting proxy (who shall hold office until the next Ordinary Shareholders’ Meeting) is henceforth one of the inalienable powers of the Shareholders’ Meeting. All natural or legal persons are eligible for election, provided they are independent from the company within the meaning of Art. 728 CO. Re-election is possible. The independent voting proxy can be recalled up to the end of a Shareholders’ Meeting.

3.2 Instructions and Proxies

The Board of Directors is required to ensure that shareholders have the possibility to provide specific instructions to the independent voting proxy with regard to every presented proposal as well as general instructions concerning non-announced proposals. In the event that no instructions are provided, the OaEC now offer clarity: Whereas until now the controversial practice existed (up to now an explicit statutory requirement under Art. 689d para. 2 CO for custodian proxies), by which in cases of doubt one would have to vote in accordance with the motions of the board of directors (“in dubio pro administratione”), Art. 10 para. 2 of the OaEC now stipulates that the independent voting proxy is required to abstain from voting in such cases. This provision is aimed at causing the will of the shareholders to be reflected in the most genuine form possible. This leads to the additional result – in companies in which the majority of votes present is decisive in the sense of the non-mandatory rules set forth in Art. 703 CO – of abstentions effectively counting as no-votes.

Also newly added to the Federal Constitution is an obligation upon companies to provide shareholders with the option of indirect electronic voting (so-called indirect voting). Shareholders now have the possibility of providing instructions and proxies electronically to the independent voting proxy. Not covered by this, however, is the direct electronic vote (electronic voting in real time).

3.3 Criminal Sanctions

The second subparagraph of Art. 24 para. 2 of the OaEC explicitly provides that appointing a proxy of deposited shares or corporate proxy is a criminal offense. In addition to this, obstructing the annual election of the voting proxy by the Shareholders’ Meeting is also punishable (subpara. 3, let. a.), as is obstructing electronic instructions and the electronic granting of proxies (subpara. 3, let. c.). If a member of the board of directors, “against his better judgement”, renders himself criminally liable in this regard by action or omission, he can be punished with imprisonment of up to three years or a fine (maximum of six years’ annual compensation).

3.4 Transitional Provisions

The OaEC enter into force on 1 January 2014. Pursuant to the transitional provisions, companies that fall within the scope of application of the OaEC must have at least one independent voting proxy available by the first Shareholders’ Meeting that takes place after the entry into force of the Ordinance. Because the identity of this person must be communicated already before the Shareholders’ Meeting takes place, it will be necessary - by way of an exception - that he be appointed by the board of directors for the first Shareholders’ Meeting, provided he was not already chosen during a previous Shareholders’ Meeting (Art. 30 para. 1 OaEC).

If the articles of association provide for corporate proxies and proxies of deposited shares, amendments thereto must be made at the latest at the second Ordinary Shareholders’ Meeting after the entry into force of the Ordinance (Art. 27 para. 1 OaEC), i.e. no later than at the Ordinary Shareholders’ Meeting concerning fiscal year 2014 (held in 2015). Worth noting in this context is that corporate proxies and proxies of deposited shares will no longer be permissible already as of 1 January 2014.

The provisions on indirect voting (granting of proxies and instructions electronically to independent voting proxies) will be applicable as of the 2015 Ordinary Shareholders’ Meeting.