



Revision of the Swiss company law:

SWIPRA welcomes the Federal Council's opinion in large parts – No „OaEC-Plus“

Zurich, November 25, 2016 – In its opinion on the revision of the Swiss company law published on November 23, 2016, the Swiss Federal Council also commented on the transfer of the Ordinance against Excessive Compensation (OaEC) to the Swiss company law, which is currently being revised. The Federal Council deviates in important aspects from its preliminary draft, which was subject to a public consultation process in early 2015. SWIPRA welcomes that the former “OaEC-Plus” version, containing several provisions beyond the requirements of the original OaEC was dismissed. Retained in the current opinion is a minimum gender quota at the level of the board of directors as well as the executive committee, which SWIPRA commented critically in the official consultation process. Overall, SWIPRA considers the Federal Council's opinion as balanced since it leaves companies a good level of freedom to individually shape their governance structures, while strengthening shareholder rights in important aspects.

In the course of its revision, the Swiss corporate law will be amended by the provisions of the OaEC, reflecting the demands of the public “initiative against rip-off salaries”. Following the public consultation in early 2015, in which SWIPRA was engaging, the Federal Council now released its opinion to the Swiss parliament for further consultation. The preliminary draft of the corporate law revision contained several provisions beyond the requirements of the original OaEC. As a consequence, the Federal Council's message favoring the original OaEC framework represents a landmark decision. The most important provisions concerning corporate governance are:

No “OaEC-Plus”

Many of the preliminary draft's provisions going beyond the original OaEC's demands, such as for example a requirement to include a maximum ratio of base to total compensation in the company's articles of association, the prohibition to vote prospectively on compensation amounts or the possibility to file responsibility lawsuits against members of the board of directors or the executive management at the company's expense, were dropped. Particularly the first two provisions would have limited the companies' flexibility considerably while the current shareholder rights (binding votes on compensation votes and disclosure requirements regarding compensation matters) would have been strengthened only marginally. Results from the [SWIPRA corporate governance survey](#) further pointed out that such provisions would not have been in the interest of many shareholders.

Mandatory advisory vote on compensation report in case of a prospective voting regime

Retaining the possibility for companies to vote prospectively, i.e. in advance, on binding compensation amounts is consistent with current market practice. Following the implementation of the OaEC, the majority of the Swiss-listed companies opted for a prospective voting regime, often combined with a consultative vote on the compensation report. Companies with a prospective voting regime will now be obliged to hold an advisory vote on their compensation report. This set-up benefits shareholders as it allows them to voice their opinion on the use of the prospectively approved compensation amounts once they are allocated. SWIPRA was among the first to recommend the combination of a prospective



voting regime on compensation amounts and an advisory vote on the compensation report as the most efficient and balanced setting shortly after the release of the OaEC at the end of 2013 ([position paper](#)). SWIPRA, therefore, welcomes the decision of the Federal Council to retain the possibility of a prospective voting regime.

Gender quota

According to this provision, each gender must be represented with at least 30% on the board of directors and at least 20% on the executive committee. Whenever this minimum requirement is not fulfilled, a company needs to explain why the quota has not been achieved and what measures the company has initiated to achieve the minimum level in due time. While a balanced representation of both genders on the board and the executive committee is socio-politically desirable, empirical research could so far not prove a positive impact of legally required gender quotas on companies' overall value creation. Moreover, the SWIPRA corporate governance survey 2016 revealed that only a minority of investors believes that gender diversity is particularly relevant for board composition while the diversity of expertise and knowledge is considered particularly relevant. As a consequence, SWIPRA generally opposes a minimum gender quota. Moreover, regulatory quotas as observed here are generally arbitrary and cannot be objectively rationalized. Even the currently envisioned "comply or explain"-approach may not prevent companies, in anticipation of possible negative publicity, to constitute their governing bodies with less suitable candidates, particularly on the level of the executive committee. Such a development is arguably not aligned with shareholder interests. Overall, SWIPRA retains its opinion that such a quota is justified based on socio-political arguments only. It is, however, not warranted to prescribe companies, against the will of their owners, how to staff their governing bodies.

Clarification of prohibited payments

Payments related to non-compete agreements shall be limited to an amount no higher than the average compensation of the past three years. Extra upfront payments to newly hired executives shall be permitted as long as such payments compensate for a verifiable financial disadvantage related to leaving the previous appointment. In any case, such payments will be subject to a binding and mandatory shareholder vote and have to be disclosed in the compensation report. SWIPRA is of the opinion that a more transparent disclosure of such payments clearly is within of the board of directors' responsibility towards its shareholders and a crucial element of a credible compensation strategy. SWIPRA, therefore, welcomes the proposals of the Federal Council in this regard.

Further items

The preliminary draft revision also included provisions concerning *disclosure of individual executive committee member compensation* and the *right of action for individual shareholders at the expense of the company*, which the Federal Council decided to exclude from the company law revision. Further, the decision of a *fully electronic AGM* (online shareholder forum) will be left to the board of directors. Contrary to the preliminary draft revision, the current version allows companies with a prospective compensation voting regime to use the *supplementary amount* not only for new external hires to its executive management during the year, but also for promotions into its executive management. It should further be positively noted that shareholders will, according to the current draft, also be allowed to provide the board with the right to alter a company's equity *capital* within a pre-defined *band-width* over a five-year period. This will significantly increase the financing flexibility of a company.



SWIPRA considers the provisions of the opinion of the Federal Council on the revision of the company law, with the exception of the gender quota, as balanced. Leaving behind the idea of an “OaEC Plus”-version provides the board of directors with the necessary room to structure the governance framework for each company individually, while shareholders are provided with far-reaching rights for cases, where in their opinion, the board would not act in the best interest of the company’s stakeholders. Since the implementation of the OaEC, a generally higher transparency and disclosure level as well as an increase in communication between companies and investors can be observed. SWIPRA welcomes that the Federal Council’s current opinion takes into account the established processes of the market while meeting the requirements set forth by shareholders as documented in various SWIPRA studies on corporate governance in Switzerland.

About SWIPRA

SWIPRA is an independent proxy advisor and corporate governance specialist. Based on the principles of value-based management combined with the objective of long-term shareholder value generation, SWIPRA provides analyses and voting recommendations on a variety of Swiss issuers listed on the SIX Swiss Exchange. www.swipra.ch

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