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# Corporate Governance

**Switzerland**
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# SWITZERLAND

## Law and Practice

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# 1. Introduction

## 1.1 Forms of Corporate/Business Organisations

The principal forms of corporate organisations in Switzerland are the stock corporation (*Aktiengesellschaft* or AG) and the limited liability company (*Gesellschaft mit beschränkter Haftung (GmbH)* or LLC). The AG is the most important company form; it is suitable for all sizes and types of business and it is the only company form that can be listed on a stock exchange. Both the AG and LLC feature a separate legal personality, a predetermined capital divided into shares or quotas and a limitation of liability to their own assets.

## 1.2 Sources of Corporate Governance Requirements

The primary sources of law relating to corporate governance are the law on Swiss stock corporations (Article 620ss of the Swiss Federal Code of Obligations; CO, company law) and, for listed corporations, the Swiss Federal Act on Financial Market Infrastructure and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act, or FMIA).

**FMIA**

The FMIA regulates the organisation and operation of financial market infrastructure and the conduct of financial market participants in securities and derivatives trading.

The FMIA is further specified by ordinances. There are three ordinances on stock exchanges and securities trading, of which one is issued by the Swiss government (Federal Council) directly, a second issued by the Swiss Financial Market Supervisory Authority (FINMA) and a third ordinance regulating public takeovers issued by the Swiss Takeover Board (TOB).

In addition to the issuance of ordinances in its field of competence, the regulatory body FINMA also has the authority to issue directives (circulars). Relevant are the FINMA circular "Minimum standards for remuneration schemes of financial institutions" (2010/01), as amended 1 January 2017, the circulars "Corporate Governance – insurance companies" (2017/02, which completely revised and replaced the previous circular 2008/35) and "Corporate Governance – banking institutions" (2017/01) both addressing corporate governance, risk management and the internal control system.

**Listing Rules**

The stock exchanges, SIX Swiss Exchange AG (SIX) and the smaller BX Swiss AG (BX), both self-regulatory organisations under the FMIA, have issued Listing Rules with specific reporting and disclosure requirements, partially amended by the new Financial Services Act (FinSA) effective from 1 January 2020. To improve transparency on corporate governance SIX has enacted the "Directive on Information Relating to Corporate Governance" (SIX Corporate Governance Directive), the current version dating from January 2020. It requires SIX-listed issuers to disclose, in a separate chapter of their annual report, important information on the management and control mechanisms at the highest corporate level, or to give valid reasons for not doing so ("comply or explain").

In addition, the SIX "Directive on Disclosure of Management Transactions" as amended as of 1 May 2018 obliges issuers with a main Swiss listing and (indirectly) their members of the board and executive management to disclose and report management transactions in their securities.

Furthermore, following a popular referendum adopted by the Swiss voters in 2013, the Ordinance against Excessive Compensation in Listed Companies (OaEC) of 1 January 2014 introduced a binding say-on-pay regime that had to be implemented for the first time for the business year 2016. The OaEC is applicable only to stock corporations governed by the Swiss company law, whose shares are listed on a stock exchange in Switzerland or abroad. It does not apply, in particular, to companies that have only listed debt securities or non-voting participation certificates and, in general, not to any privately held companies.

**Corporate Governance Standards**

Moreover, the well-respected Swiss Code of Best Practice for Corporate Governance (SCBP), issued by Economiesuisse (www.economiesuisse.ch), the most important association of Swiss businesses from all sectors of the economy, sets corporate governance standards in the form of non-binding recommendations ("comply or explain"). It primarily addresses Swiss public companies, but also serves as a guideline for non-listed Swiss companies and organisations of economic significance. It structures, integrates and reflects various provisions of Swiss legislation on corporate governance and accepted corporate practice and sets high standards of corporate governance which are accepted and observed by many companies in Switzerland.

SCBP recommendations cover, for instance, the definition of corporate governance, general shareholder meetings, shareholders' rights to information and inspection, the composition of the board of directors and of board committees, the role of auditors, and the compensation for boards of directors and executive boards of public companies. The SCBP has been reviewed and revised with effect from September 2014.

**Institutional Investors**

In addition, an important group of representatives of Swiss institutional investors (such as the Swiss Association of Pension Fund Providers and the Federal Social Security Funds), Swiss businesses (including the Swiss Business Federation,

Economiesuisse) and proxy advisers (Ethos fund) published the "Guidelines for institutional investors governing the exercise of shareholder rights in Swiss listed companies". Unlike the SCBP, which primarily addresses listed companies, these non-binding guidelines are directed towards institutional investors and aim at enhancing good corporate governance by describing best practices for the exercise of shareholders' rights by institutional investors. The guidelines' importance increased when Swiss pension funds became obliged to exercise their voting rights and to disclose their voting decisions under the OaEC as from 1 January 2015.

Finally, Economiesuisse and SwissHoldings, the federation of industrial and services groups in Switzerland, have issued an additional set of standards named "Main Features of an effective Compliance Management". It sets out five principles of an effective compliance management and is meant as a guideline for Swiss multinational enterprises.

### 1.3 Corporate Governance Requirements for Companies with Publicly Traded Shares

Companies with publicly traded shares have to fulfil additional corporate governance requirements. In particular, the OaEC regulates the election and remuneration of the board of directors. The chairperson as well as each member of the board of directors and the members of the compensation committee have to be appointed individually and annually by the shareholders' general meeting.

The board's proposal on the compensation of directors, the executive management (and, if any, the advisory board compensation) has to be submitted annually to the shareholders for a binding vote (binding say-on-pay). Further, the Listing Rules of the SIX and BX provide for specific reporting and disclosure requirements. In addition, the SIX Corporate Governance directive requires SIX-listed companies to disclose important information on the management and control mechanisms at the highest corporate level, or to give valid reasons for not doing so ("comply or explain").

The SCBP also sets out non-binding recommendations regarding the corporate governance of large Swiss entities. The following analysis will provide further information regarding corporate governance requirements for publicly held (and privately held) companies.

## 2. Corporate Governance Context

### 2.1 Key Corporate Governance Rules and Requirements

There are no further key corporate governance rules that are not addressed in the analysis hereinafter.

### 2.2 Current Corporate Governance Issues and Developments

A (revised) proposal for a revision of the existing stock corporation law (company law) has been submitted by the Swiss Federal Council already in 2014 followed by a consultation process among interested parties. In November 2016, the Swiss Federal Council published its final draft and dispatch, and submitted it to the Swiss Parliament, where it has been controversially debated in several instances. The proposed revision integrates the OaEC into Swiss federal statutory law, focuses on strengthening shareholder rights and introduces more flexible rules on establishing companies and on company capital, and deals with further aspects associated with corporate governance.

**Gender Diversity**

With respect to gender diversity draft bill provides that women should represent at least 30% of the board of directors and at least 20% of the executive management. Following a "comply or explain" approach, a company that does not meet these provisions shall be required to state the reasons, and the actions that are being taken to improve the situation, in its remuneration report. The new company law is not expected to enter into force before 2021.

**Human Rights and Environmental Standards**

A legislative initiative "For responsible companies – for the protection of humans and environment" (Group Responsibility Initiative) was filed at the end of 2016. It was the subject of heated debate in both chambers of Swiss Parliament until June 2020 but shall be submitted for vote before the end of the year 2020. The aim of the initiative is to create the statutory basis for companies headquartered in Switzerland to respect human rights and the environment throughout the world.

It calls for a far-reaching statutory obligation to actively monitor and prevent violations of internationally recognised human rights and environmental standards and. More controversially, the initiative provides that Swiss HQ-companies may be held liable for damage caused by violations of companies under their control, not only in Switzerland but also abroad. This original initiative is not supported by the Swiss government. A parliamentary counter-proposal shall be presented to the voters obliging Swiss companies to mere monitoring and reporting duties (similar to EU regulation).

### 2.3 Environmental, Social and Governance (ESG) Considerations

Swiss corporations, including listed companies, are currently under no obligation to specifically report on ESG related issues. According to its Corporate Social Responsibility Action Plan for 2020-2023, the approach of the Swiss government is so far limited to sensitising domestic companies to ESG, offering support to companies seeking to address relevant issues and establishing a best practice based on international standards.

However, since 2017, SIX Swiss Exchange offers listed issuers the opportunity, by means of an opting in, to publish an issuer's commitment to environmental, social, and governance (ESG) principles by way of an annual sustainability report in accordance with an internationally recognised standard for the benefit of investors. Currently issuers may use as a reporting standard the Global Reporting Initiative, the Sustainability Accounting Standards Board Standard, the UN Global Compact and the European Public Real Estate Sustainability Best Practices Recommendations.

**Assessment and Reporting Duties**

The public debate on the above-mentioned Group Responsibility Initiative (see **2.2 Current Corporate Governance Issues and Developments**), has led the Parliament to propose the introduction of a variety of ESG related assessment and reporting duties for larger companies and companies active in certain high-risk sectors, such as mining. According to these proposals, the relevant companies should be to obliged to identify ESG related risks in their business (including their supply-chains), take appropriate measures to minimise these risks and continuously report on their efforts. These proposals have notably been inspired by the EU Directive 2014/95 on Corporate Social Responsibility and the Regulation 2017/821 relating to mineral resources from conflict-affected and high-risk areas.

Despite the currently still soft approach of the Swiss regulator, international policy developments are expected to significantly increase the strategic importance of ESG issues in the coming years, and also in Switzerland. The Paris Agreement's aim of redirecting finance flows towards low greenhouse gas emissions and climate-resilient development has furthered the continued development and implementation of international sustainability reporting standards, such as those of the Global Reporting Initiative (GRI) and the Sustainability Accounting Standards Board (SASB). It is also a driving factor of EU-wide policy projects on sustainability, such as the European Green Deal Investment Plan and the EU Action Plan on Sustainable Finance. As regards Switzerland, a governmental report is in preparation and is expected to be issued later this year to propose what measures (self-regulatory restrictions, state-imposed targets or a regulation mirroring the EU Action Plan on Financial Sustainability) could be taken.

### 2.4 The Impact of COVID-19 on Governance

As of 16 March 2020, the Swiss Government (Federal Council) had issued a ban on all public or private in-person meetings exceeding five persons. These restrictions have been gradually relaxed to allow for larger gatherings (as from 5 June 2020, up to 300 persons). Since this ban explicitly inhibited many companies from holding general meetings, the Federal Council has temporarily implemented special measures to facilitate general meetings in compliance with the rules on social distancing.

**Voting Rights and Meetings**

Pursuant to the Swiss COVID-19 Ordinance 2, the organiser of a general meeting (ie, the board of directors in stock corporations) may decide that voting rights may only be exercised in writing, electronically or through an independent proxy. Such decision may (subject to governmental amendments) only be taken until 30 June 2020, while the assembly itself may be held at a later point in time. The decision to exclude physical participation must be communicated in writing or published electronically no less than four days before the meeting.

However, the formal requirements for calling the general meetings still apply, including the 20-day notice period (see **5.3 Shareholder Meetings**). Even if a company decides to exclude physical shareholder participation, a general meeting with a skeleton of functionaries must still be physically held at a certain place and time. A meeting by circular resolution is not permitted.

Regardless of how voting rights are exercised, companies should also carefully examine whether the meeting itself should be held behind closed doors or whether shareholders should be able to virtually participate (as observers only) through webcast, livestream or videoconference. It should be noted that Companies which have received and are still holding state-backed emergency loans are, inter alia, not allowed to distribute dividends or repay intragroup loans, whether within Switzerland or cross-border.

## 3. Management of the Company

### 3.1 Bodies or Functions Involved in Governance and Management

In a Swiss stock corporation, three bodies are involved in the governance and management.

**General Meeting of Shareholders**
The shareholders' meeting is the supreme authority as set forth by law and the articles of association. It decides the fundamental organisation of the company, elects the board of directors and takes the fundamental decisions.

**Board of Directors**
The board of directors is the executive body. Swiss corporate law provides that the board may pass resolutions on all matters not reserved to the general meeting by law or the articles of association and shall manage the business of the company to the extent it has not delegated such management to individual members or executive management in accordance with organisational regulations.

**Statutory Auditors**
The statutory auditor is a controlling body as provided by law. However, in companies with fewer than ten full-time employees, shareholders may unanimously decide not to appoint an auditor. The scope of an auditor's duties depends on the nature and size of the enterprise; listed, large and mid-sized corporations are subject to an ordinary audit, while smaller corporations may be subject to a more limited financial audit only.

## 3.2 Decisions Made by Particular Bodies

**Shareholders' Meetings**
The shareholders' general meeting defines the framework of the company's business activities. In doing so, the general meeting has to decide upon the following matters as they are fundamental, non-transferable competences conveyed to the shareholders' meeting under company law:

- adoption and amendment of the articles of association, including changes in the share capital, issuance of preferred shares, approval of mergers and changes in the company's corporate structure;
- approval or rejection of the annual business report, including the consolidated financial statements;
- approval or rejection of the use of the balance sheet profit and, in particular, the declaration of dividends;
- election of the members of the board of directors (within the scope of the OaEC, ie, in listed companies, elections must be held annually and individually for each board member, including the direct election of the chairperson);
- removal of the members of the board at a shareholder meeting;
- election and removal of the members of the compensation committee and of the independent proxy (pursuant to the OaEC) as well as the auditors;
- approval or rejection of the compensation of the board, the executive management and, if any, the advisory board (pursuant to the OaEC);
- release of the members of the board of directors from liability (discharge); and
- matters that are by law or by articles of association reserved to the general meeting of shareholders (special audit pursuant to shareholders' information rights, liquidation of the company, etc).

**The Board of Directors**
The board of directors is responsible for the ultimate management and representation of the company. Its core duty is to determine the corporate strategy and allocate corporate resources (strategic governance). In general, the board is authorised to decide all matters that are not reserved to the shareholder meeting or to the auditors by law or by the articles of association, or delegated to the executive management based on organisational regulations.

Statutory law enumerates certain fundamental matters specifically reserved to the board. The following board responsibilities are non-delegable and inalienable:

- the ultimate management of the company; in particular, the duty to determine the corporate strategy and allocate the corporate resources (strategic governance);
- defining the fundamental organisational structure;
- setting up an accounting and financial controlling system (including an internal control system for medium-sized and larger businesses) as well as financial planning as far as necessary to manage the company;
- appointing and removing the management as well as granting of signing authority to the individuals authorised to act on behalf of the company;
- ultimately monitoring the individuals entrusted with management responsibilities, in view of compliance with the applicable law, the articles of association, regulations and directives;
- preparing annual business reports and general shareholder meetings as well as implementing its resolutions;
- issuing the annual compensation report on the board's and executive management's compensation, and election of the compensation committee consisting of members of the board (pursuant to the OaEC); and
- notifying the bankruptcy court if the company's liabilities are no longer covered by its assets (over-indebtedness).

Notwithstanding the non-delegable and inalienable nature of these responsibilities, the board of directors may delegate the preparation and execution of its resolutions to committees, but not the decision-making itself. Companies often establish an audit committee, a compensation committee and/or a nomination committee.

**Statutory Auditors**
The statutory auditors serve as a controlling body by reviewing the annual accounts and the motions made by the board to the shareholders' meeting on the allocation of the balance sheet profit and by reporting to the shareholders' meeting whether the annual accounts comply with the statutory provisions, the articles of association and the applicable financial reporting standards.

### 3.3 Decision-Making Processes
The shareholders' general meeting is convened by the board of directors. The notice must include the agenda items, and the boards' and, if any, shareholders' motions. Resolutions can only be made on motions relating to agenda items that were duly notified (for further information, see **5.3 Shareholder Meetings**). In general, the absolute majority of the votes represented is necessary to pass a resolution and conduct elections.

**Resolutions**
For certain important resolutions such as an authorised capital increase, introduction of transfer restricted shares, etc, the law requires a qualified majority; ie, two thirds of the voting rights represented and the absolute majority of the nominal value of shares represented. A quorum for a qualified majority may also be increased for other matters by a resolution of the general meeting which satisfies the proposed quorum. In most companies, the principle of one share – one vote applies.

The articles of association may, however, also provide for voting shares. These can often be found in family-controlled companies, both private and listed.

According to company law, the board of directors' resolutions may be made by a (relative) majority of the votes cast at the meeting. However, the articles of association and the organisational regulations may also require a qualified majority regarding the presence of a minimum of board members as well as the specific vote of the board. In the case of a tie, the chairperson has a casting vote, unless the articles of association provide otherwise.

Resolutions may also be taken by circular written resolution if no member requests a meeting.

## 4. Directors and Officers

### 4.1 Board Structure
Swiss company law generally provides for a one-tier board model. In practice, however, day-to-day management (except for the non-delegable and inalienable competences of the board, see **3.2 Decisions Made by Governing Bodies**) is often, and typically in listed companies, delegated from the board to the executive management, thus leading to a two-tier board structure. Such rightful delegation excludes the directors' liability for damages provided that the board applied the necessary care in selecting, instructing and supervising the management.

As a particularity, banks and private insurance companies are required by law to establish a two-tier structure with a functional and personal separation of operative management and supervision.

### 4.2 Roles of Board Members
Swiss company law does not specify the roles of the members of the board of directors in detail.

**Chairpersons**
The chairperson of the board shall ensure the timely and appropriate information of the board members and the preparation of its meetings. The chairperson also acts as a primary contact person to the executive management, chairs the general meeting, represents the company internally and externally, and generally ensures the proper functioning of the board.

Even though the law does not mention the position of vice-chairperson, it is advisable to appoint one as the chairperson may be prevented from performing their duties. The scope of the vice-chairperson's duties shall be defined in the organisational regulations.

**Other Appointments**
In addition, the board of directors may appoint a secretary who does not need to be a member of the board. The secretary's duties are of mere administrative nature relating to the board's tasks, such as taking the minutes, etc.

The SCBP also recommends the role of a lead director; in particular, to prevent or address any potential conflict of interest situations. The lead director, an experienced non-executive member of the board, may be appointed in the event that a single individual should assume the functions of chairperson and CEO. The appointment of lead directors is not uncommon for listed companies in Switzerland.

### 4.3 Board Composition Requirements/ Recommendations
Regarding the composition of the board, the current Swiss company law is very flexible and the shareholders enjoy broad discretion. Swiss company law contains no rule on the maximum number of seats, no age restrictions on board members and, so far, no diversity requirement for companies. The current revision of the Swiss company law proposes the introduction of guidelines on gender representation for the boards of direc-

tors and executive boards in listed companies (see **2.2 Current Corporate Governance Issues and Developments**).

The SCBP emphasises that the board of directors shall be composed of members of both genders. In addition, while, until 2008, there were certain mandatory legal requirements regarding nationality and domicile, today, no such formal prerequisites must be met for a board appointee, with the exception of being a natural person (no legal entity).

**Regulated Industries**
In regulated industries – in particular, the financial industry – regulation strictly requires the members of the executive bodies of supervised institutions to grant assurance of proper business conduct and required knowledge and experience ("fit and proper"). According to FINMA, the main purpose of these requirements is to maintain public confidence in those institutions and to safeguard the reputation of the Swiss financial centre.

Assurance of proper business conduct covers matters of personal character (including criminal records) and professional qualifications required for the proper management of a supervised entity. The principal criterion used in assessing a person's suitability is their past and present business activity.

## 4.4 Appointment and Removal of Directors/ Officers

Only the shareholders may vote on the appointment or the removal of any of the directors. This is permissible whenever a shareholder meeting is held and its agenda provides for the respective election or removal. Significant shareholders are entitled to request the board to convene an extraordinary shareholder meeting and put the requested items on the agenda.

Under the OaEC provisions for listed companies, the chairperson of the board of directors, each member of the board of directors and the members of the compensation committee must be appointed and (re-)elected individually and annually by the shareholder meeting. In non-listed companies, the elected board members may resolve on the board's organisation, constitution, its members' functions and notably appoint the chairperson without a shareholders' vote.

Unless otherwise provided by the articles of association, the shareholders' meeting passes resolutions on the election and removal of any director by an absolute majority of the votes represented at the respective meeting.

## 4.5 Rules/Requirements Concerning Independence of Directors

Swiss company law does not require business corporations to have independent directors. The SCBP, however, emphasises that independent decisions can emerge only by exchanging ideas and critical views between the board of directors and executive management. It recommends that the majority of the board should consist of independent members, meaning non-executive members of the board of directors who have never or at least not for the last three years been members of the executive board and have no or comparatively minor business relations with the company.

Where there is cross-involvement in other boards of directors, the independence of the member in question should be carefully examined on a case-by-case basis. The board of directors may define further criteria of institutional, financial or personal independence. The nomination committee should be predominantly composed of independent directors. For the compensation committee, only independent members of the board of directors should be proposed for election to the shareholders.

**Banking and Insurance**
For banking and insurance entities, FINMA has issued rules in its circulars "Corporate Governance – banking institutions" (2017/01) and "Corporate Governance – insurance companies" (2017/02). Pursuant to these rules, at least one third of the board of a banking entity must consist of non-executive and independent directors. Board members are generally considered to be independent if they are not (and have not during the past two years been) engaged in any other function for the respective entity (including as auditor). Independent directors shall not maintain significant business relations with the entity that could lead to conflicts of interest and/or act on behalf of significant shareholders.

**Information on Board Members**
The SIX Corporate Governance Directive requires for listed companies the publication of information for each non-executive member of the board of directors:

- whether they were a member of the management of the issuer or one of the issuer's subsidiaries in the three financial years preceding the period under review; and
- whether they have significant business connections with the issuer or one of the issuer's subsidiaries.

**Conflicts of Interest**
The statutory duty of care and loyalty requires the directors to perform their duties with due care and safeguard the interests of the company in good faith, including avoiding and properly addressing conflicts of interest. In accordance with case law, resolutions taken by the board in disregard of existing material conflicts of interest of any board member participating in such vote may be null and void. In addition, if a director fails to comply with its duty and favours its own interests over those of the

company, any shareholder may hold such director and potentially the board liable for any damage caused and seek indemnification (for D&O liability claims, see **4.8 Consequences and Enforcement of Breach of Directors' Duties**).

In practice, companies' organisational regulations will often provide for appropriate rules and measures in case of a director's conflict of interest (such as disclosure of conflict, possible abstention from voting and/or meeting).

### 4.6 Legal Duties of Directors/Officers

The board of directors is responsible for the ultimate management and representation of the company. Its core duty is to determine the corporate strategy and allocate corporate resources (strategic governance). In general, the board is authorised to decide on all matters that are not reserved to the shareholders' meeting or the auditors by law or by the articles of association, or delegated by the board to the executive management based on organisational regulations.

Statutory law enumerates certain fundamental matters specifically reserved for the board for decision (see **3.2 Decisions Made by Governing Bodies**).

### 4.7 Responsibility/Accountability of Directors

The board owes its fiduciary duties primarily to the company and must represent, and act in, the company's best interests. When determining the best interests of the company, the board, according to the prevailing legal opinion in Switzerland, shall consider the long-term interests of the shareholders as well as those of other stakeholders, such as the company's employees or creditors.

### 4.8 Consequences and Enforcement of Breach of Directors' Duties

The board members and the "de facto directors" (ie, persons not formally appointed as directors but who factually act as directors and significantly influence the company's decision-making process), as well as the members of executive management, are liable for damages caused by intentional or negligent breach of their duties. As a rule, such D&O liability is joint and several, and each director may be held personally liable. Under the business judgement rule, it is generally accepted that any business decision taken in a proper, unbiased and reasonably informed manner does not constitute a breach of obligations, even if it turns out to have been materially wrong in retrospect.

The expected level of care is generally assessed under an objective standard. Specialist knowledge may however lead to raised expectations as to the actions of an individual board member.

**Liability Actions**

D&O liability actions may be brought by the company, the shareholders, either directly if they suffered direct damage or as a derivative suit on behalf of the company if a shareholder has suffered an indirect damage (ie, damage to the value of their shares resulting from damage suffered by the company); and, in the event of its bankruptcy only, the company's creditors. However, formal actions against board members are rather rare in practice. Many conflicts end with out-of-court settlements, frequently facilitated (and financed) by D&O insurers.

In addition, while Swiss company law contains some rules to address and ease the cost concerns that typically arise in the event of shareholder lawsuits, these rules do not effectively foster shareholders' actions, mainly because they are inapplicable to payments of advances to the courts. Finally, plaintiffs may also prefer actions against auditors, where deemed possible, in search of "deep pockets".

### 4.9 Other Bases for Claims/Enforcement Against Directors/Officers

In addition to the potential claims mentioned under **4.8 Consequences and Enforcement of Breach of Directors' Duties**, the board of directors of listed companies may be subject to criminal sanctions pursuant to the OaEC if it consciously, "against board's better knowledge", authorises payments to members of the executive management or receives inadmissible remuneration in violation of the applicable say-on-pay regulations (ie, by paying forbidden golden handshake payments, etc).

As a principle, companies cannot validly preclude the liability of directors and executive management in advance. The annual shareholder meeting may, however, grant discharge to the directors and executive management for the preceding business year. As a consequence, the company itself and all shareholders voting in favour of the resolution are precluded from bringing an action against the directors and executive management with regard to facts known to the shareholder meeting at the time.

Often, companies seek D&O insurance coverage for their members of the board and executive management.

### 4.10 Approvals and Restrictions Concerning Payments to Directors/Officers

For private companies, it is generally the exclusive competence of the board to determine the remuneration of its members and the executive management.

The Swiss Federal Supreme Court has persistently stated that the remuneration must be justifiable with a view to the general financial situation of the company as well as to the relative contributions of the individual board members to the company.

This principle also follows from the duty of care and loyalty of board members, which only vaguely limits the board's discretion in determining the remuneration. The Supreme Court exercises restraint in reviewing remuneration decisions as it considers the companies' governing bodies to be best suited to address such issues.

In the event of apparently disproportionate remuneration – for example, when there is misappropriation of corporate funds – Swiss company law provides for a special action to recover damages suffered by the company. In addition, excessive misappropriation of funds could, under certain circumstances, also be relevant from a criminal law perspective (disloyal management). For certain financial institutions, the FINMA circular "Minimum standards for remuneration schemes of financial institutions" sets standards applicable to all employees, including senior management.

**Say-on-Pay**

Swiss companies with shares listed on a Swiss or foreign exchange, however, are obliged to submit annually the board's proposal on executive compensation to the shareholders for a binding vote (binding say-on-pay). The shareholder meeting has to vote separately on the proposed aggregate amount of compensation for each of the board of directors, the executive management and, if any, the advisory board. In contrast to certain foreign legislations on executive pay, the Swiss OaEC does not, however, impose a limit or maximum amount (cap) on remuneration.

Companies are required to set out the details of the vote on compensation in their articles of association. Various models are possible. It is, for example, possible to vote on fixed compensation for the term until the next ordinary shareholder meeting (prospective vote) and on a performance-based compensation for the closed financial year (retrospective vote). A trend seen in recent AGM seasons is that major Swiss listed companies provide in their articles of association for a vote on a compensation cap, whereby the shareholders shall in advance vote on the maximum amounts of compensation for the respective governing bodies for the coming business year (prospective vote).

In addition to such prospective binding vote, some Swiss multinational companies plan to hold a (retrospective) consultative non-binding say-on-pay vote after the respective business year – a bit paradoxically – to address international market expectations and particularly voting guidelines of globally acting proxy advisers. Specific types of executive benefits and compensations – such as loans, credits and pension benefits outside the occupational pension – require an explicit basis in the company's articles of association. This also applies to the maximum terms and the maximum notice periods for service or employment agreements with members of the board of directors and of the executive management; in any event, notice periods or fixed contract terms exceeding one year are impermissible.

Certain types of compensation to members of the board and executive management – eg, non-statutory severance payments ("golden parachutes"), undue advanced compensation ("golden hello") or certain types of transaction bonuses – are not allowed. The conscious ("against better knowledge") payment or receipt of impermissible compensation by members of the board of directors, the executive management, or the advisory board (if any) is punishable by imprisonment and a fine.

**Special Requirements During Public Bids**

Following the launch of a public takeover offer, any amendments to executive agreements with senior management members may qualify as defensive measures and as such may not be altered subject to the shareholder meeting and TOB approval. Even in a pre-bid phase, the TOB may, as case law demonstrates, declare null and void any changes to agreements of senior management if fundamental principles of corporate law – in particular, the duty to act in the company's best interests – are disregarded.

### 4.11 Disclosure of Payments to Directors/Officers

Privately held companies are not required by law to disclose specifically the remuneration, fees, or benefits payable to the directors. Regarding publicly held companies, however, the applicable regulations under Swiss company law require that the aggregate amounts but also the comprehensive compensation packages of each of the board's members as well as the highest total compensation package among the members of senior management be disclosed separately. That information is to be disclosed in a separate audited compensation report to the shareholders pursuant to OaEC.

The SIX Corporate Governance Directive extends the abovementioned requirement to all issuers with a primary listing at the SIX Swiss Exchange (ie, with no other main listing) whether incorporated in Switzerland or not. In addition, it requires disclosure of information on the basic principles and elements of compensation and share-ownership programmes as well as the method of its determination.

For banking entities, insurances, funds as well as branches thereof, FINMA has issued rules in its circular "Minimum standards for remuneration schemes of financial institutions", in effect since 1 January 2010. These rules contain the basic principles and general elements of compensation with regard to all employees, directors and officers of the company. However, implementation of these rules is only compulsory for larger banks and insurance companies.

# 5. Shareholders

## 5.1 Relationship Between Companies and Shareholders

The general meeting of shareholders is the paramount body of a company. The shareholders are entitled to elect and remove the board of directors and the statutory auditors.

Swiss company law provides for a variety of rights of shareholders that may be categorised in participation and property rights, including the right to information and inspection, and the right to set the dividends. The SCBP emphasises the importance that shareholders need to be informed in such a way that they can exercise their rights in full knowledge of the relevant facts.

## 5.2 Role of Shareholders in Company Management

The management of a company is by statutory law conveyed to the managing body (board of directors and executive management). Consequently, shareholders are not supposed to be involved in the management of the company (for their competences, see **3.2 Decisions Made by Governing Bodies**). Shareholders may, however, try to exert pressure and thus indirectly influence the decision-making process and actions of the board; for example, by formally requesting additional information or a non-binding vote in a shareholder meeting on a specific issue that falls within the competence of the board, by threatening or bringing removal motions relating to certain board members, or shareholders' suits against the company to protect their rights, or against liable directors or officers to penalise non-compliance with statutory duties and recover damages.

It is also more common that shareholder activists use the media to make the relevant position of the (dissident) shareholder known to the public.

## 5.3 Shareholder Meetings

Ordinary and extraordinary shareholder meetings are a core element of corporate governance in Switzerland. The ordinary general meeting has to take place physically once a year within six months of the end of the financial year. Further, extraordinary general meetings may be convened as and when required.

**Convening a Meeting**

In general, the board of directors convenes the general meeting. Further, shareholder(s) who represent(s) at least 10% of the share capital or shares with a nominal value of CHF1 million may request the convening of a meeting. In order to hold a shareholder meeting, the notice convening the meeting must be given no later than 20 days before the date for which it is scheduled.

The notice must include the agenda items and the motions of the board of directors, and, if any, of the shareholders who have requested the meeting to take place or an item to be placed on the agenda. These formal invitation rules may be disregarded in the case of a universal meeting where all shareholders or representatives of all the company's shares are present.

**Shareholder Participation**

When conducting the meeting, shareholders are entitled to participate and exercise their rights in person or by proxy. Based on the OaEC provisions, shareholders of listed Swiss companies may also authorise an institutional proxy, the so-called independent proxy. Such independent proxy needs to be elected by the shareholder meeting and is obliged to exercise the voting rights granted by the shareholders in accordance with his or her respective instructions.

Direct remote electronic voting is not yet introduced by law, but listed Swiss companies are obliged to ensure that powers of attorney and instructions for the independent proxy may also be given electronically; in particular, via the internet (indirect electronic voting).

## 5.4 Shareholder Claims

D&O liability actions may be brought under the Swiss company law in accordance with Articles 754ss CO by the company; the shareholders, either directly if they suffered direct damage or as a derivative suit on behalf of the company if shareholders have suffered an indirect damage (ie, damage to the value of his or her shares resulting from damage suffered by the company); and, in the event of the company's bankruptcy, the company's creditors. See **4.8 Consequences and Enforcement of Breach of Directors' Duties**.

## 5.5 Disclosure by Shareholders in Publicly Traded Companies

Pursuant to the FMIA, significant shareholders who acquire or sell equity securities (shares, options or other financial instruments) of a Swiss listed company (or foreign company primarily listed on a Swiss stock exchange) and, in doing so, reach or cross the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50% or 66⅔% of the voting rights of the company must notify the company and the stock exchange within four trading days. Within two additional trading days, the company shall disclose to the public any reports it has received concerning such changes in the ownership of its shares.

# 6. Corporate Reporting and Other Disclosures

## 6.1 Financial Reporting

All companies are obliged to prepare an annual report with the annual accounts, composed of the balance sheet, the profit and loss statement, and the notes to the accounts. Larger companies additionally have to draw up a cash flow statement and a management report. In general, the annual report must be made available to the company's shareholders, but, in private companies, not to the public.

SIX-listed companies must publish (by ad hoc announcement) audited annual reports and unaudited half-yearly interim financial reports in accordance with International Financial Reporting Standards or, where permitted in the respective trading segment, with alternative recognised accounting standards (such as US Generally Accepted Accounting Principles (US GAAP) or Swiss GAAP-FER).

## 6.2 Disclosure of Corporate Governance Arrangements

Contrary to privately held companies, listed companies have to fulfil certain reporting and disclosure requirements provided for by the SIX Listing Rules, starting with a duty to disclose significant shareholdings (see **5.5 Disclosure by Shareholders in Publicly Traded Companies**). Further requirements include the following:

**Ad Hoc Publicity**

As a rule, the company must immediately disclose to the market potentially price-sensitive, not publicly known facts that occur in connection with the business activities of a listed company, including changes to the board or executive management.

**Information on Management and Control Mechanisms**

The SIX Corporate Governance Directive requires SIX-listed issuers to include in their annual report a separate corporate governance section concerning important information on the management and control mechanisms at the highest corporate level. Although information on remuneration is compulsory (see **4.10 Approvals and Restrictions Concerning Payments to Directors/Officers**), other broad categories of information – such as group and capital structure, board of directors, auditors, shareholder participation rights, change of control or defence measures, as well as information policy – may be dealt with in accordance with the principle of "comply or explain". If the issuer decides not to disclose certain information, it must explain why.

**Management Transactions**

The SIX Directive on Disclosure of Management Transactions imposes obligations on listed issuers to disclose any buy or sell transactions concluded by the directors and members of the executive management in the respective issuer's equity securities or financial instruments. Each issuer has to ensure that its members of the board and executive management report each management transaction to the issuer within two trading days. The issuer has to publish the notified transaction via the SIX electronic reporting platform for the disclosure of management transactions within three trading days following such notification; the report will be shown without mentioning the individual's name.

## 6.3 Companies Registry Filings

Swiss companies must file relevant corporate information and changes thereof with the competent Cantonal Registry of Commerce; in particular, changes in the articles of association, such as changes of corporate purpose, capital structure, any share transfer restrictions, appointments to the board as well as other individuals authorised to sign on behalf of the company. This information is publicly available. Filings must be made upon occurrence and are also published in the Swiss Official Gazette of Commerce.

# 7. Audit, Risk and Internal Controls

## 7.1 Appointment of External Auditors

Depending on the size of the entity, a company has to submit its accounts and financial statements to an ordinary (full) audit, or a limited audit, or there is no audit at all. If there is an audit requirement, the company has to elect an appropriate qualified independent auditor. An ordinary audit of the annual accounts, and if applicable the consolidated accounts, is necessary for the following companies:

- public companies that trade their shares at the stock exchange, have bonds outstanding, or contribute at least 20% of the assets or of the turnover to the consolidated accounts of a listed company;
- companies that exceed two of the following thresholds in two successive financial years: a balance sheet total of CHF20 million, sales revenue of CHF40 million, 250 full-time positions on annual average;
- companies that are required to prepare consolidated accounts;
- if the company's shareholders who represent at least 10% of the share capital request so; or
- if the articles of association provide for it or the shareholder meeting decides that the annual accounts are subject to an ordinary audit, even if the law does not require so.

An ordinary audit must be carried out by an external qualified auditor. If the company is not subject to an ordinary audit, it has to submit its annual accounts for a limited audit by a licensed independent auditor. With consent of all shareholders, a limited audit may be waived if the company does not have more than ten full-time employees.

Auditors are accountable and may be liable to the company and to the shareholders and creditors for losses arising from any intentional or negligent breach of their duties.

### 7.2 Requirements for Directors Concerning Management Risk and Internal Controls

Swiss financial reporting rules require that companies or groups of companies that have to submit their annual accounts to an ordinary (full) audit (see **7.1 Appointment of External Auditors**) are subject to a review and confirmation by the auditors as to the existence of an appropriate internal control system. There are, however, no statutory requirements for the specific establishment and effective organisation of the internal control system. This responsibility lies with the board of directors. An exception applies for banks and private insurance companies, for which FINMA has set forth specific requirements regarding risk management and internal controls in the relevant circulars.

Such companies additionally have to report on the company's risk assessment process and the identified material risks in the management report accompanying the annual financial statements. These provisions shall ensure that the corporate risk of medium-sized and large enterprises is regularly monitored and analysed. The ultimate responsibility lays with the board of directors, which has to evaluate material business-related risks in a forward-looking and systematic manner.

In addition, the SCBP also recommends that the board of directors should provide internal control and risk management systems that are suitable for the company. Risk management shall refer to financial, operational and reputation-based risks.

**Schellenberg Wittmer Ltd** is one of the leading Swiss business law firms. Over 150 specialised lawyers in Zurich, Geneva and Singapore advise domestic and international clients on all aspects of business law. The firm offers a comprehensive range of services from focused advice to project management, for corporate clients and high net worth individuals. Schellenberg Wittmer has one of the most specialised corporate and commercial practices in Switzerland. The firm provides expert advice to public and private companies, as well as entrepreneurs and investors from around the world across all aspects of corporate law, including corporate governance, fiduciary duties, corporate responsibility (including CSR, ESG aspects, etc), shareholder activist situations, executive compensation as well as compliance and risk management. It has extensive experience in corporate restructurings and reorganisations (mergers, spin-offs and split-offs and other strategic alternatives) and corporate crisis management matters in distressed situations.

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