

PROXY PAPER™

# GUIDELINES

2016 PROXY SEASON

AN OVERVIEW OF THE GLASS LEWIS  
APPROACH TO PROXY ADVICE

## SWITZERLAND



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# Guidelines Introduction

These guidelines are intended to supplement Glass Lewis' Continental European Policy Guidelines by highlighting the key policies that we apply specifically to companies listed in Switzerland and the relevant regulatory background to which Swiss companies are subject, where they differ from Europe as a whole. Given the growing convergence of governance regulations and practices across companies subject to European Union rules and directives, although we recognise that Switzerland is not subject to EU laws since it is not a member, Glass Lewis combined our general approach to continental European companies in a single set of guidelines, the Continental European Policy Guidelines, which set forth the underlying principles, definitions and global policies that Glass Lewis uses when analysing continental European companies.

While our approach to issues addressed in the Continental European Policy Guidelines are not repeated here, we will clearly indicate in these guidelines when our policy for Swiss companies deviates from the Continental European Policy Guidelines.

## CORPORATE GOVERNANCE BACKGROUND

The legally-binding requirements for publicly-listed Swiss companies are primarily based in the Swiss Code of Obligations, which was initially approved March 30, 1911.

Best practices for corporate governance are regulated by the Swiss Code of Best Practice for Corporate Governance ("CBPCG"), first adopted by a special panel commissioned by the SWX (now SIX) Swiss Exchange on March 25, 2002 and last reviewed in 2014. Although the revisions made during 2014 include the introduction of a "comply or explain" principle, the CBPCG essentially offers only non-binding recommendations that are generally unspecific in nature. In their preface to the CBPCG, the executive board of *economiesuisse* specifically encourage companies to "retain the option of putting its own ideas on structuring and organisation into practice." As a result, Swiss companies remain relatively free to depart from some central tenets of the CBPCG. That being said, areas which have seen some increased specificity relate to the composition of a company's board of directors, with a definitive statement that the majority should be independent, and considerably more detail with respect to the format of both compensation reports and executive compensation structures.

Following the March 2013 approval of a federal popular initiative, commonly referred to in English as either the Minder Initiative or the referendum "against rip-off salaries", the Swiss Constitution (*Bundesverfassung der Schweizerischen Eidgenossenschaft*) includes additional provisions intended to protect the Swiss economy, private property, the shareholders of Swiss companies and sustainable corporate governance practices. While the principles contained in the constitution come fully into effect in 2016, the Code of Obligations has not yet been amended to incorporate these provisions. Until such a time that Swiss law is permanently amended, Swiss companies will be subject to a Transitional Provision (*Verordnung gegen übermässige Vergütungen bei börsenkotierten Aktiengesellschaften or VegüV*), which was adopted on November 22, 2013. In some cases, the provisions of the Transitional Provision conflict with the provisions of the Swiss Code of Obligations; in these cases, the Transitional Provision supersedes the Code of Obligations.

Although Switzerland is not a member of the European Union, many Swiss best practices are based on pan-European principles. While we note that Swiss corporate governance does have some unique features, we believe that best practices broadly align with continental European standards.

## SUMMARY OF CHANGES FOR THE 2016 SWITZERLAND POLICY GUIDELINES

Following is a summary of the significant changes to the 2016 Switzerland guidelines:

### DIRECTOR OVERBOARDING POLICY

In line with changes to our Continental Europe Policy Guidelines, we have updated our guidelines to reflect that going forward we will recommend voting against a board member who serves as an executive officer of any public company while serving on a total of more than two (previously three) public company boards and any other director who serves on a total of more than five (previously six) public company boards. We expect a chairman of any public company to reduce his or her external commitments appropriately and we may not recommend that shareholders vote against overcommitted directors at companies where the director serves as chairman. Further, we will generally refrain from recommending to vote against a board member who serves on an excessive number of boards within a consolidated group of companies or a board member that represents a firm whose sole purpose is to manage a portfolio of investments which include the company.

# I. A Board of Directors that Serves Shareholder Interest

## ELECTION OF BOARD OF DIRECTORS

Under Swiss law, a company is governed by a single board that may be comprised of some executive members, but should consist of mostly non-executive members.<sup>1</sup> A Swiss company may choose to separate the oversight and management roles of the Company's leadership by excluding executive members from the board of directors and forming a separate executive committee. Even if a company establishes an executive committee, the board of directors is always entrusted with the direction of a company and other oversight functions.<sup>2</sup> As a result, a two-tier board system is not strictly possible under Swiss law. Nevertheless, it is not uncommon that Swiss companies, in effect, separate the functions of the board of directors from the executive duties carried out by an executive committee.

## INDEPENDENCE

In Switzerland, we put directors into three categories based on an examination of the type of relationship they have with the company:

1. **Independent Director**<sup>3</sup> – An independent director has no material,<sup>4</sup> financial, familial<sup>5</sup> or other current relationships with the company,<sup>6</sup> its executives, or other board members, except for board service and standard fees paid for that service. An individual who has been employed by the company within the past five years<sup>7</sup> is not considered to be independent. We use a three year look back for all other relationships.
2. **Affiliated Director** – An affiliated director has a material financial, familial or other relationship with the company or its executives, but is not an employee of the company.<sup>8</sup> We will normally consider directors affiliated if they:
  - Have – or have had within the past three years – a material relationship with the company;
  - Have been employed by the company within the past five years;
  - Receive fees that significantly exceed other directors on the company's board and the boards of its peers, aligning with executive pay levels, which do not correspond to increased board responsibilities;

1 Article 12 of the Swiss Code of Best Practice for Corporate Governance ("CBPCG").

2 Article 716a of the Swiss Code of Obligations ("CO").

3 Article 14 of the CBPCG states that an independent director is a non-executive member of the board of directors who was never, or was not more than three years ago, a member of the executive management, and who has no comparatively minor business relation with the company.

4 Per Glass Lewis' Continental European Policy Guidelines, "material" as used herein means a relationship in which the value exceeds: (i) CHF 50,000 (or 50% of the total compensation paid to a board member, or where no amount is disclosed) for board members who personally receive compensation for a professional or other service they have agreed to perform for the company, outside of their service as a board member. This limit would also apply to cases in which a consulting firm that is owned by or appears to be owned by a board member receives fees directly; (ii) CHF 100,000 (or where no amount is disclosed) for those board members employed by a professional services firm such as a law firm, investment bank or large consulting firm where the firm is paid for services but the individual is not directly compensated. This limit would also apply to charitable contributions to schools where a board member is a professor, or charities where a board member serves on the board or is an executive, or any other commercial dealings between the company and the board member or the board member's firm; (iii) 1% of either company's consolidated gross revenue for other business relationships (e.g., where the board member is an executive officer of a company that provides services or products to or receives services or products from the company); (iv) 10% of shareholders' equity and 5% of total assets for financing transactions; or (v) the total annual fees paid to a director for a personal loan not granted on normal market terms, or where no information regarding the terms of a loan have been provided.

5 Per Glass Lewis' Continental European Policy Guidelines, familial relationships include a person's spouse, parents, children, siblings, grandparents, uncles, aunts, cousins, nieces, nephews, in-laws, and anyone (other than domestic employees) who shares such person's home. A director is an affiliate if the director has a family member who is employed by the company.

6 A company includes any parent or subsidiary in a group with the company or any entity that merged with, was acquired by, or acquired the company.

7 In our view, a five-year standard is appropriate because we believe that the unwinding of conflicting relationships between former management and board members is more likely to be complete and final after five years. However, Glass Lewis does not apply the five-year look back period to directors who have previously served as executives of the company on an interim basis for less than one year. We note that, pursuant to Article 14 of the CBPCG, a three-year look-back period applies to former employment relationship.

8 If a company classifies a non-executive director as non-independent, Glass Lewis will classify that director as an affiliate, unless there is a more suitable classification (i.e., shareholder representative, employee representative).

- Have served on the board for more than 12 years;<sup>9</sup>
  - Own or control 10% or more of the company's share capital or voting rights;<sup>10</sup>
  - Have close family ties with any of the company's advisers, directors or employees; and/or
  - Hold cross-directorships or have significant links with other directors through their involvement with other companies.<sup>11</sup>
3. **Inside Director** – An inside director simultaneously serves as a director and as an employee of the company. This category may include a chairman of the board who acts as an employee of the company or is paid as an employee of the company.<sup>12</sup>

### Voting Recommendations on the Basis of Board Independence

Glass Lewis believes a board will be most effective in protecting shareholders' interests when at least a majority<sup>13</sup> of the directors are independent. Where 50% or more of the members are affiliated or inside directors, we recommend voting against some of the inside and/or affiliated directors in order to satisfy the majority threshold. However, we accept the presence of representatives of significant shareholders in proportion to their equity or voting stake in the company.

### Voting Recommendations on the Basis of Committee Independence

We believe that only non-executive directors should serve on a company's audit and compensation committees. Further, we believe a majority of the members of these committees should be independent from the company and its significant shareholders.<sup>14</sup>

We believe a majority of the members of the nominating committee should be independent of company management and other related parties. However, we accept the presence of a full-time chairman on the nominating committee in accordance with market practice in Switzerland. We accept the presence of representatives of significant shareholders on this committee in proportion to their equity or voting stake in the company.

## OTHER CONSIDERATIONS FOR INDIVIDUAL DIRECTORS

Our policies with regard to performance, experience and conflict-of-interest issues are not materially different from our Continental European Policy Guidelines. The following is a clarification regarding best practice recommendations in Switzerland:

### CONFLICTS OF INTEREST

Glass Lewis generally recommends shareholders vote against directors serving on an excessive number of boards and on this point, our policies are not materially different from our Continental European Policy Guidelines. We note that in Switzerland however, each company must identify in its articles of association how many external

9 EU Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board. Annex II. Article 1 (h). Though Switzerland is not party to the EU, we believe that this requirement represents best practice in developed European markets. While we will classify board members as affiliates in accordance with this standard, we will evaluate voting recommendations based on this issue on a case-by-case basis. When a board or committee does not meet the independence standards set forth in these guidelines solely as a result of a nominee's length of service on the board, we may refrain from recommending voting against the nominee if the board or relevant committee is otherwise sufficiently independent.

10 Per Glass Lewis' Continental European Policy Guidelines, we view 10% shareholders as affiliates because they typically have access to and involvement with the management of a company that is fundamentally different from that of ordinary shareholders. More importantly, 10% holders may have interests that diverge from those of ordinary holders, for reasons such as the liquidity (or lack thereof) of their holdings, personal tax issues, etc.

11 Article 14(2) of the CBPCG states that in the event of "cross-involvement" the independence of the member in question should be carefully examined by the board of directors on a case-by-case basis.

12 It is fairly common in Switzerland for a designated non-executive chairman to exercise duties associated with a full-time executive chairman. In general, any chairman who receives a total compensation package that is in line with the company's top executives, and who is eligible to receive a significant amount of performance-based compensation, will be considered an insider.

13 Article 12 of the CBPCG states that at least a majority of directors should be non-executives. We note, however, that Article 3(B.b) of Circular 6/06 of the Swiss Federal Bank Commission requires that at least one-third of the board of a banking entity consist of non-executive directors who are independent from the company's management, auditors, major business partners and major shareholders.

14 EU Commission Recommendation of 15 February 2005 on the role of non-executive directors of listed companies and on the committees of the board. Annex I. Article 3.1. Given the importance of the audit committee's work, we believe that a high level of independence from major shareholders is necessary. As such, we believe a majority of audit committee members should always be independent of the company and shareholders holding 20% or more of the company's share capital or voting rights. We will take into account the company's ownership structure when evaluating the composition of the compensation committee. However, we believe that a majority of the members of the compensation committee should be independent of controlling shareholders (i.e. those owning or controlling 50% or more of a company's total share capital).

mandates a director may hold.<sup>15</sup> In accordance with our Continental European Policy Guidelines, we typically recommend shareholders vote against a director who serves as an executive officer of any public company while serving on more than two public company boards and any other director who serves on more than five public company boards. Moreover, we recommend that shareholders vote against any proposal that seeks to allow directors to serve on an excessive number of boards pursuant to our guidelines. We may also refrain from recommending against the nominee if the company provides a sufficiently compelling explanation regarding his or her significant position on the board, specialised knowledge of the company's industry, strategic role (such as adding expertise in regional markets or other countries), etc. We will also generally refrain from recommending to vote against a board member who serves on an excessive number of boards within a consolidated group of companies or who represents a firm whose sole purpose is to manage a portfolio of investments which include the company.

## BOARD STRUCTURE AND COMPOSITION

Our policies with regard to board-level risk management oversight and board diversity are not materially different from our Continental European Policy Guidelines. The following is a clarification regarding best practice in Switzerland.

### SEPARATION OF THE ROLES OF CHAIRMAN AND CEO

The Code of Best Practice for Corporate Governance states that when the chairman serves as an executive, an independent lead director should be appointed.<sup>16</sup> While there is no regulation in Switzerland mandating that the two roles should remain separate, best practice is increasingly moving to separation of the two roles.

In line with our Continental European Policy Guidelines, when Swiss companies combine the positions of chairman and CEO, and the board is not sufficiently independent and/or the board has failed to appoint a lead independent director, we will generally recommend voting against the chairman of the nominating committee.

### BOARD DIVERSITY

The CBPCG recommends that a company's board of directors be composed of both male and female members.<sup>17</sup> Absent a meaningful justification for failure to comply with this basic standard, Glass Lewis may consider recommending that shareholders vote against the chairman of the nominating committee where large boards have failed to appoint any female board members or taken appropriate steps to diversify the board in relation to the company's business, size and international scope.

## BOARD COMMITTEES

Our policies with regard to the formation of committees and committee performance are not materially different from our Continental European Policy Guidelines.

Swiss boards are recommended to set up separate audit<sup>18</sup> and nominating committees;<sup>19</sup> most Swiss companies comply. Compensation committees are mandatory in Switzerland and subject to a separate, individual election.<sup>20</sup> Further, a company must outline the duties and responsibilities of its compensation committee in the articles of association.<sup>21</sup> We generally recommend that shareholders vote for proposals to define the duties and responsibilities of the compensation committee in the articles of association so long as such provisions do not contradict Swiss law, Glass Lewis' guidelines, and general principles of good governance.

<sup>15</sup> Article 95(3)c of the Swiss Constitution (*Bundesverfassung der Schweizerischen Eidgenossenschaft*) and Articles 27(1) and 12(1) of the Transitional Provision ("VegüV").

<sup>16</sup> Article 19 of the CBPCG.

<sup>17</sup> Article 12 of the CBPCG.

<sup>18</sup> Article 23 of the CBPCG.

<sup>19</sup> Article 27 of the CBPCG.

<sup>20</sup> Article 2(2)2 of the Transitional Provision ("VegüV") and Article 95(3)a of the Swiss Constitution (*Bundesverfassung der Schweizerischen Eidgenossenschaft*)

<sup>21</sup> Articles 7(5) and 12(1.3) of the Transitional Provision ("VegüV").

## ELECTION PROCEDURES

Our policies with regard to election procedures are not materially different from our Continental European Policy Guidelines. According to Swiss law, the board chairman and all directors must be elected individually by shareholders at the annual general meeting for terms that may not exceed one year.<sup>22</sup> Additionally, members of the compensation committee must be elected on an annual, individual basis.<sup>23</sup> A company's articles of association must clarify the specific procedure for the election of the chairman, board members and compensation committee members.<sup>24</sup>

If a nominee is up for election to both the board and the compensation committee, we will generally recommend voting against both election proposals wherever a concern regarding the director's performance on the committee, the independence of the committee or any other concern would lead to an against recommendation based on our guidelines.

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<sup>22</sup> Article 95(3)a of the Swiss Constitution (*Bundesverfassung der Schweizerischen Eidgenossenschaft*).

<sup>23</sup> *Ibid.*

<sup>24</sup> Article 12(2)7 of the Transitional Provision ("*VegüV*").

# II. Transparency and Integrity in Financial Reporting

In Switzerland, shareholders are asked to vote on a number of proposals regarding the audited financial statements, the appointment of auditor<sup>25</sup> and the allocation of profits or dividends<sup>26</sup> on an annual basis. Our policies with regard to these matters are not materially different from our Continental European Policy Guidelines.

## ACCOUNTS AND REPORTS

As a routine matter, Swiss company law requires that shareholders approve a company's annual and consolidated financial statements, within the six months<sup>27</sup> following the close of the fiscal year, in order for them to be valid.<sup>28</sup>

## INDEPENDENT PROXY

Shareholders at all Swiss companies must approve the appointment of an independent proxy on an annual basis.<sup>29</sup> Glass Lewis views this as a routine voting item and will recommend shareholders support such proposals. We believe all shareholders who will not attend the meeting in person should carefully consider whether they wish to either use the proposed independent proxy to act on their behalf, or to appoint an independent proxy of their choice.

Shareholders that opt to use an independent proxy may be offered an opportunity to vote in line with management if additional shareholder proposals are included on a meeting agenda after votes are cast electronically. Absent evidence of potentially contentious items to be discussed at the meeting or serious concerns with management's past actions, we will recommend shareholders vote for this authorisation.

## AUTHORISING A PROXY TO VOTE ON AD HOC PROPOSALS

In Switzerland, shareholders may be asked to authorise a proxy to vote on any new proposals presented by shareholders or the board of directors which are not included in the agenda for the meeting. We generally recommend that shareholders abstain from voting on these proposals.

<sup>25</sup> Article 698 (2.2) of the CO.

<sup>26</sup> Article 698 (2.4) of the CO.

<sup>27</sup> Article 699 (2) of the CO.

<sup>28</sup> Article 698 (2.3) of the CO.

<sup>29</sup> Article 95(3)a of the Swiss Constitution (*Bundesverfassung der Schweizerischen Eidgenossenschaft*) and articles 5(8)1 and 9 of the Transitional Provision ("VegüV").

# III. The Link Between Compensation and Performance

Following the March 2013 approval of the Minder Initiative – also known as the referendum “against rip-off salaries” – sweeping changes were made to Switzerland’s laws governing corporate compensation practices. Pursuant to the passage of the initiative, public companies headquartered in Switzerland or that have shares traded on Swiss exchanges are guided by certain passages within the Swiss constitution which lay down laws regarding the compensation of both executive and board members. Most notably, certain payments to executives are prohibited by Swiss law and shareholders are required to approve executive and board compensation.

While the laws regarding compensation and the principle characteristics of compensation-related proposals are more proscriptive in Switzerland than elsewhere in Europe, our policies regarding these issues are not materially different from our Continental European Policy Guidelines.

## COMPENSATION REPORT

As a result of the legal structure outlined above, Swiss companies must draw up annual compensation reports which are subject to the reporting principles and accounting provisions applicable to companies’ annual reports and financial statements.<sup>30</sup> The compensation report must similarly be audited by a company’s independent auditor, and both the report and the auditor’s findings must be published and available to shareholders at least 20 days prior to a company’s annual general meeting. While the Swiss Code of Best Practice for Corporate Governance includes some broad principles and guidelines for the drafting of a compensation report, these are considerably less prescriptive than the specific legal requirements to which most Swiss companies are subject.

A company’s compensation report must include all direct and indirect payments to current members of the executive board, the board of directors and the advisory board during the year under review.<sup>31</sup> The report must also include all payments made to former members of these boards if said payments relate to individuals’ previous employment or were made against market practice, though this excludes pension payments, disability insurance and life insurance.<sup>32</sup> All awards received by members of these boards – which include a base salary, bonus payments, equity awards, in-kind benefits, pension expenses and payments for additional services – must be included in the compensation report,<sup>33</sup> and the total remuneration paid to each member of the board of directors and the advisory board must be disclosed on an individual basis.<sup>34</sup> Further, the compensation report should provide details of total compensation paid to the executive board as a whole and the details of payments made to its mostly highly paid member.<sup>35</sup> Similarly, a compensation report must include individualised information regarding outstanding loans and credit granted to members of these boards, as well as individualised information regarding outstanding loans and credit granted to former members of these boards, when said arrangements were not made in accordance with market standards.<sup>36</sup> Additionally, the compensation report must include information regarding direct and indirect payments made to parties closely related to members of the executive board, board of directors and advisory board if said payments are not made in accordance with market standards,<sup>37</sup> though when documenting these transactions, the identities of the related parties need not be given.<sup>38</sup> Where directors have received significant payments through related party transactions or loans not made in accordance with market standards and their identities are not disclosed, we may recommend voting against the chairman of the compensation committee.

30 Article 13 of the Transitional Provision (VegüV).

31 Article 14(1)(1-3) of the Transitional Provision (“VegüV”).

32 Article 14(1)4 of the Transitional Provision (“VegüV”).

33 Article 14(2) of the Transitional Provision (“VegüV”).

34 Article 14(3) of the Transitional Provision (“VegüV”).

35 Article 14(3) of the Transitional Provision (VegüV) and Article 38 of the CBPCG.

36 Article 15 of the Transitional Provision (“VegüV”).

37 Article 16(1) of the Transitional Provision (“VegüV”).

38 Article 16(2) of the Transitional Provision (“VegüV”).

## COMPENSATION ELEMENTS GOVERNED BY LAW AND ARTICLES OF ASSOCIATION

Board members and executives in Switzerland are prohibited from receiving severance packages, payments in advance, or bonuses for the takeover or transfer of business units.<sup>39</sup> Further, we note that the following payments continue to be allowable under the law: (i) termination payments which executives are owed upon termination with a maximum notice period of one year; and (ii) payments made upon joining a company to compensate for the loss of compensation from a previous employer. Where such payments are made, Glass Lewis will carefully evaluate the terms and believe shareholders should expect a reasonable level of disclosure to be provided by companies.<sup>40</sup>

Companies were required to amend their articles of association in order to codify the compensation payable to members of the executive board, board of directors and advisory board by the end of 2016. Such provisions include a description of the principles governing the allocation of performance based and/or equity based incentives.<sup>41</sup> Where a company seeks to amend these provisions Glass Lewis will continue to carefully evaluate such amendments. Loans, credits, pension payments, and any performance-based compensation or equity payments and options are also forbidden if these forms of compensation are not governed by a company's articles of association.<sup>42</sup>

## VOTE ON EXECUTIVE COMPENSATION (“SAY ON PAY”)

In Switzerland, all annual meetings must hold separate votes on the compensation of the executive board, the board of directors and the advisory board,<sup>43</sup> which are both annual<sup>44</sup> and binding.<sup>45</sup> Outside of these provisions though, companies have some freedom in choosing how to conduct compensation votes at annual meetings. A company's articles of association must describe the company's procedures regarding how compensation votes are held,<sup>46</sup> specifically whether votes on variable compensation are prospective or retrospective in character. Prospective votes define a maximum budget payable during an upcoming fiscal year; retrospective votes approve levels of compensation based on executives' attainment of performance objectives. Glass Lewis believes shareholders are better served when companies offer retrospective votes on variable executive compensation given that these votes allow for a more meaningful review of the pay-for-performance link. Where a company opts for prospective votes on executive compensation, we will consider the overall compensation structure, the appropriateness of individual incentive limits and past granting practices before recommending in favour of the aggregated executive compensation amount. Further, Glass Lewis believes that shareholders asked to approve compensation on a prospective basis may reasonably expect particularly comprehensive disclosure including the intended breakdown of the amount over different compensation elements and a discussion of the determination process leading to the total figure.

If a company opts to submit executives' compensation for approval prospectively, the articles of association may include guidance on the allocation of specific additional compensation (*Zusatzbetrag*) for executives appointed after a prospective vote; this additional amount is designated for use on an interim basis, until such time as a vote can be held at the following annual general meeting.<sup>47</sup> We generally recommend that shareholders approve such proposals in order to grant the board sufficient flexibility to hire executives; however, we will evaluate proposals on a case-by-case basis, taking into account a company's existing budget and rationale when making our recommendation. We believe it is more appropriate for shareholders to express any concerns regarding an executive's compensation at the annual general meeting following the individual's appointment, so that the pay-performance link can be evaluated in a more meaningful manner.

39 Article 95(3)b of the Swiss Constitution (*Bundesverfassung der Schweizerischen Eidgenossenschaft*) and Article 20(1-3) of the Transitional Provision (“VegüV”).

40 *Ibid.*

41 Article 95(3)c of the Swiss Constitution and Articles 20(4-5), 31(1) and 12(2-3) of the Transitional Provision (“VegüV”).

42 Article 12(1-3, 5, 8) of the Transitional Provision (“VegüV”).

43 Articles 18(3)2 and 31(2) of the Transitional Provision (“VegüV”) and Article 95(3)a of the Swiss Constitution (*Bundesverfassung der Schweizerischen Eidgenossenschaft*).

44 Article 18(3)1 of the Transitional Provision (“VegüV”).

45 Article 18(3)3 of the Transitional Provision (“VegüV”).

46 Articles 12(1)4 and 18(2) of the Transitional Provision (“VegüV”).

47 Article 19 of the Transitional Provision (“VegüV”).

Companies may opt to continue holding non-binding, advisory votes on their compensation policies and practices for shareholder approval in addition to the aforementioned binding votes. Glass Lewis believes that continuing to offer a separate advisory vote on the compensation policy or report, even when offering the legally mandated votes on compensation amounts, to be in the best interests of shareholders. In our view, such a vote is more likely to allow shareholders to express their concerns regarding executive compensation by taking a broader view of a company's compensation policies.

Glass Lewis will continue to analyse companies' compensation practices and policies as presented in the compensation report and/or annual report even if shareholders are only presented with votes on executives' aggregate compensation, and whether such votes are prospective or retrospective in nature. Where a company has provided shareholders with a non-binding vote on the compensation report, we will generally focus our analysis of the binding proposal on the appropriateness of the amount requested, using the non-binding proposal to address concerns with the overall compensation structure.

Glass Lewis will continue to evaluate Swiss companies' say-on-pay proposals pursuant to policies that do not deviate materially from our Continental European Policy Guidelines. The Swiss Code of Best Practice sets out very general recommendations for best practices regarding executive compensation, emphasising the following best practice recommendations:<sup>48</sup>

- Executive compensation policies should include fixed and variable components with a focus on medium and long-term sustainability;
- Variable executive compensation should be both dependent on the sustainable development of the company and take into account individual performance;
- The board of directors should determine whether share-based compensation is necessary in order to align executives' interest with those of long-term shareholders and, if subject to deferral, take into account appropriate performance criteria into account;
- Incentive payments should be reduced or canceled if targets are not met;
- Employment contracts may provide for repayment or forfeiture of awards in the event of a serious lack of compliance or where payments are deemed to be "non-justified";
- Stock options should be exercised above market value at grant date and not subject to retesting;
- Pay amounts should be set relative to peers.

## CONDITIONAL CAPITAL RESERVED FOR EQUITY-BASED COMPENSATION

In Switzerland, shareholders do not directly vote on equity compensation plans, but rather are asked to approve the underlying authority to increase the company's conditional share capital.<sup>49</sup> As described above, the terms and conditions of equity awards are defined in a company's articles of association. Any amendments to plan structures must be accomplished through a separate vote on amending a company's articles.

Companies may also acquire the necessary shares through a repurchase program, or through ordinary or authorised capital increases. In most cases, Swiss companies opt for an increase in conditional capital, which may be valid for a period of up to five years and must be included in a company's articles of association.<sup>50</sup> In order to protect shareholders from excessive dilution, we recommend that conditional capital increases for the purpose of equity-based executive compensation plans are limited to 5% of a company's total share capital.<sup>51</sup>

<sup>48</sup> Articles 35 through 37 of the CBPCG.

<sup>49</sup> Article 653 of the CO.

<sup>50</sup> *Ibid.*

<sup>51</sup> In accordance with established best practice in Switzerland, authorities funding long-term equity-based compensation plans should not exceed 5% of share capital.

# IV. Governance Structure and the Shareholder Franchise

In Switzerland, shareholders are asked to approve proposals regarding a company's governance structure, such as the ratification of board acts and amendments to the articles of association. While we have outlined the principle characteristics of these types of proposals that we encounter in Switzerland below, our policies regarding these issues are not materially different from our Continental European Policy Guidelines.

## RATIFICATION OF BOARD ACTS

Pursuant to Swiss law, shareholders can release board members from liability with respect to a specific period of time or a particular business transaction.

The discharge from liability is binding for those shareholders who voted in favour of the proposal and can hinder legal claims against board members. In fact, it protects directors against claims for damages even though such claims are based on willful misconduct, fraud or criminal offences. However, directors can still be liable towards third parties under criminal law. Furthermore, the discharge is valid only with respect to facts that have been fully disclosed.

Shareholders who did not approve the ratification of board acts or who acquired shares following the ratification can file claims against the board within six months from the adoption of the relevant proposal.<sup>52</sup>

## RESTRICTIONS ON TRANSFERRING SHARES/NUMBER OF VOTES

The articles of association of many Swiss companies allow for entrenched management by limiting the number of registered shares that may be transferred, by setting a limit beyond which the shareholder cannot register his shares or by limiting the number of votes that a shareholder can represent, irrespective of the number of shares he may own. Additionally, the articles of association of some Swiss companies specify shareholders may be restricted in the number of votes they may represent at a general meeting.<sup>53</sup> In accordance with our Continental European Policy Guidelines, we recommend that shareholders vote against any proposal that increases restrictions on shareholders.

## RIGHT OF SHAREHOLDERS TO CALL A SPECIAL MEETING

We note that pursuant to Swiss law, shareholders holding at least 10% of a company's share capital are entitled to call a shareholder meeting; however, lower thresholds may be set in a company's articles of association.<sup>54</sup> When a company's board proposes to lower this threshold, we will generally recommend support of such a proposal.

<sup>52</sup> Article 758 of the CO.

<sup>53</sup> Article 692(2) of the CO.

<sup>54</sup> Article 699(3) of the CO.

# V. Capital Management

In Switzerland, shareholders are rarely asked to approve share or convertible bonds issues, or to repurchase and reissue shares. More frequently, shareholders are asked to approve a pool of authorised, but unissued, shares, which the board may use at its discretion. While we have outlined the principle characteristics of these types of proposals that we encounter in Switzerland below, our policies regarding these issues are not materially different from our Continental European Policy Guidelines.

## INCREASE IN AUTHORISED CAPITAL

According to Swiss law, shareholders may delegate the power to increase the share capital to the board. Notwithstanding the aforementioned, shareholders must determine the length of the authority, which cannot exceed 24 months, and the overall ceiling for the increase, which cannot exceed 50% of the issued share capital.<sup>55</sup> Furthermore, preemptive rights can be waived only upon specific authorisation granted by shareholders.<sup>56</sup>

In line with our Continental European Policy Guidelines, we will generally recommend voting against any authorised capital proposal which does not preserve preemptive rights above 20% of current issued share capital; further, we believe all general authorities to issue shares should have a common cap. Glass Lewis will recommend voting against any proposal that does not explicitly extend a 20% cap on share issues without preemptive rights to authorised and conditional capital authorities previously existing and/or proposed at the meeting, other than those reserved for unique purposes such as equity incentive plans.

## CONDITIONAL CAPITAL

In conjunction with issuances of convertible debt instruments with options to convert into shares, or other types of share option grants, a company may request that shareholders approve a conditional increase in share capital in order to fulfill the company's obligations to bond or option holders. Swiss companies may also propose conditional capital authorities in order to provide access to shares to be issued under equity-based compensation plans for executives (see "Conditional Capital Reserved for Equity-Based Compensation," page 10).<sup>57</sup>

We note that pursuant to Swiss law, the conditional increase in the share capital cannot exceed 50% of the existing share capital.<sup>58</sup> In line with our Continental European Guidelines, we recommend voting against any conditional capital proposal that does not preserve preemptive rights for share issues in excess of 20% of current issued capital. Glass Lewis will recommend voting against any proposal that does not explicitly extend a 20% cap on share issues without preemptive rights to authorised and conditional capital authorities previously existing and/or proposed at the meeting, other than those reserved for unique purposes such as equity incentive plans.

## AUTHORITY TO REPURCHASE SHARES

If Swiss companies intend to buy back shares, the number of shares which may be repurchased is limited to 10% of the company's capital (or 20% if registered shares are repurchased under a share transfer restriction agreement).<sup>59</sup> While companies are not required to seek shareholder approval of the buyback program, they must seek shareholder approval of the allocation of reserves to a fund to be used for a buyback program, if it does not have sufficient available reserves. We will recommend voting for such proposals when we have no concerns regarding the planned buyback program.

<sup>55</sup> Article 651 of the CO.

<sup>56</sup> Article 652b of the CO.

<sup>57</sup> Please see the previous section on equity-based compensation plans for further information.

<sup>58</sup> Article 653a of the CO.

<sup>59</sup> Article 659 of the CO.

## AUTHORITY TO CANCEL SHARES AND REDUCE CAPITAL

Pursuant to Swiss law, companies cannot hold more than 10% of their share capital as treasury stock, or 20% if the additional shares are acquired under a share transfer restriction agreement, unless otherwise approved by shareholders. Accordingly, if the 10% limit is exceeded, companies are required to cancel the excess shares within a two-year period.<sup>60</sup>

Companies occasionally seek shareholder approval to hold shares in treasury in excess of these legal limits. We will support such proposals only when a company states that any treasury shares held in excess of 20% of the company's issued capital are intended to be cancelled and we have no other concerns regarding the buyback programs.

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<sup>60</sup> Article 659(2) CO.

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