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Subject
Switzerland Law Outline for a Legal Perspective on an Annual Board “Statement of Significant Audiences and Materiality”

Setting the legal landscape

1 Briefly explain the broader legal landscape regarding the obligations that a company has to its stakeholders or with regard to its impact on stakeholders, and in particular whether its primary duty is or is not to shareholders over all other stakeholders

The main legal source for a company limited by shares (Aktiengesellschaft) is contained in Articles 620ss of the Swiss Code of Obligations ("CO") and imposes a number on duties on the members of the board of directors and those persons engaged in managing the company’s business, generally referred to as the "senior management" of the company (together the "Corporate Bodies", each a "Corporate Body"). They have to safeguard the interests of the company in good faith (duty of loyalty) and are required, when fulfilling their tasks, to observe a duty of care, a duty of confidentiality and to treat the shareholders equally (Art. 717 CO). Legal literature and Swiss scholars infer from these duties an additional duty to refrain from acting in any way that could be harmful for the company (e.g. prohibition to seize corporate opportunities or to compete with the company).

Generally, Swiss company law does allow to take into account both the interests of shareholders (which typically means maximizing shareholder returns over the
medium term) as well as the interests of other stakeholders of the company (i.e. employees, customers, suppliers, and further the community and the environment at large). This means, for example, that if a decision taken does not maximize value but can be justified by the legitimate interests of stakeholders, the individuals bound by the above mentioned duties cannot be held liable for their decision.

Corporate social responsibility ("CSR") is still a relatively new concept in Switzerland, even though some components of CSR already form part of the law. Requirements generally cover a call for sustainable management and a responsible use of the resources of the company; employee protection is provided for by the CO, the Employment Act and the Gender Equality Act.

**Regulatory Framework**

2 **To what legal tradition does the jurisdiction belong, i.e. civil/common law, mixed?**

Switzerland has a Civil law legal tradition. The Swiss legal system is based upon codified law and not primarily upon judicial precedents. However, in case codified law has to be interpreted, precedents play an important role, together with legal literature.

3 **Are corporate/securities laws regulated federally/nationally, provincially or both?**

Corporate and securities laws are regulated and enforced federally in Switzerland. Some supplementary regulation relating to listed companies is enacted by the Swiss Financial Market Supervisory Authority, the Swiss Takeover Board and the SIX Swiss Exchange (the latter as part of so-called "self-regulation").

4 **Who are the government corporate/securities regulators and what are their respective powers (in summary only)?**

The main regulatory authority is the Swiss Financial Market Supervisory Authority ("FINMA"). FINMA supervises banks, insurance companies, stock exchanges, securities dealers, collective investment schemes, distributors and insurance intermediaries. It ensures that supervised institutions comply with the relevant provisions. Furthermore, FINMA combats money laundering, supervises the disclosure of shareholdings and controls public takeovers (in cooperation with the Swiss Takeover Board ["TOB"], see below). For the fulfilment of its tasks, a broad range of instruments is at FINMA's disposal, the most severe of which is the prohibition from practicing a profession. In addition, FINMA is often involved in the drafting of financial market legislation and may, where powers have been delegated, issue its own ordinances. Finally, it is responsible for recognizing self-regulating frameworks.
The TOB is the main regulator in connection with public takeover offers. It has issued the Takeover Ordinance, which governs (together with the Stock Exchange Act) the substantive requirements and the procedure of public takeover offers. Furthermore, it ensures compliance with the provisions applicable to public takeover offers.

SIX Swiss Exchange ("SIX"), the operator of one of the most important stock exchanges in Europe, has issued several decrees governing the substantive prerequisites and the formal framework of the trading on the SIX and regulates in this context also issuers having listed shares at SIX (e.g., with respect to so-called "ad hoc disclosure" rules). The violation of any of these provisions may be sanctioned by SIX, e.g. by way of a fine and/or contractual penalty of up to CHF 10,000,000.

5 Does the jurisdiction have a stock exchange?

Switzerland currently has two stock exchanges, the SIX and the Berne Exchange. SIX is one of Europe's key regulated stock exchanges and is the reference market for about 35,000 Swiss securities. It provides services relating to regulated trading both in the cash and in the securitized derivatives markets. Most big Swiss companies are listed on the SIX.

In contrast, the Berne Exchange is mainly aimed at small and medium companies.

Incorporation and listing

6 Does the concepts of "limited" liability" and "separate legal personality" exist?

Swiss company law expressly provides the concept of limited liability and separate legal personality for several types of legal entities, e.g. in article 620 CO for companies limited by shares (Aktiengesellschaft) and in article 772 CO for limited liability companies (Gesellschaft mit beschränkter Haftung).

While shareholders are not personally liable for the company's obligations and may not be required, even under the articles of association, to contribute more than the amount fixed for subscription of a share newly issued, the articles of association of a limited liability company may stipulate under certain conditions obligations to make additional financial and/or other contributions (article 796 CO).

Notwithstanding the concept of limited liability and separate legal personality, courts may decide on a case-by-case review to pierce the corporate veil, e.g., if the conduct of a controlling shareholder is a manifest abuse of rights in order to achieve unlawful goals or to damage legitimate third party rights. As a result,
where a business is organized as a group of companies, this possibility allows to hold the parent company liable instead of its subsidiary provided that the misconduct of the subsidiary may be attributed to the parent company. In case of a company owned by a single shareholder, piercing the corporate veil serves e.g. to include the assets of the owner of the company in a bankruptcy (where fraudulent conveyance concepts may also apply); overall, piercing cases are very rare, however. See also Question 27.

7 Did incorporation or listing historically, or does it today, require any recognition by the company or its directors of a duty to society, an obligation to take account of the company's social or environmental impacts, or to respect its stakeholders?

As to date no such recognitions have been introduced in Swiss law. Instead, listing requires only compliance of the articles of association and other formation document with the laws of the company's country of incorporation. So if any recognition of a duty to stakeholders is a prerequisite under the laws of a company's home country, listing on a Swiss stock exchange requires such commitment as well. In addition, all listed companies are subject to far-reaching disclosure obligations in order to maintain listing. Depending on the company's' business activity, such information might include information useful to stakeholders.

8 Do any stock exchanges have a responsible investment index and is participation voluntary? (See e.g. FTSE4Good, Dow Jones Sustainability Index, the Johannesburg Stock Exchange's Socially Responsible Investment Index)?

SIX does provide a responsible investment index, the SXI Switzerland Sustainability 25 Index. It includes those 25 companies from the SMI Expanded Index with the best sustainability scores (http://www.six-swiss-exchange.com/indices/data_centre/shares/sxi_ssust_en.html; visited on 20 April 2015). The total score of a company is determined by similar criteria as the FTSE4Good-Indices and the Dow Jones Sustainability Index apply.

Directors' Duties

9 To whom are directors' duties generally owed?

The Corporate Bodies must perform their tasks with all required diligence and must safeguard the interests of the company in good faith (article 717 CO; see also Question 1 with respect to the issue of whose interests have to be considered). The may be held liable to the company, to each shareholder, and to creditors in the case of the company's bankruptcy for any losses or damages arising from willful or negligent violation of their duties (article 754 CO). According to the Swiss Federal Supreme Court, the above-mentioned duty to safeguard the interests of the company in good faith requires that the board ensures by appropriate
measures that the interests of the company are duly considered if a risk of a conflict of interests arises; but conflicts of interest are not specifically regulated by the current law.

The Swiss Code of Best Practice for Corporate Governance ("SCBP"), which was approved on 25 March 2002 by "economiesuisse", the umbrella organization of Swiss companies from all business sectors, and which is an act of self-regulation that contains recommendations and guidelines for good corporate governance, and recommends inter alia that, as far as possible, conflicts of interest should be avoided.

What are the duties owed by directors – please state briefly. Please indicate if there are any express or implied duties to avoid damage to the company’s reputation.

The tasks of the Corporate Bodies are set out in various legislations (e.g., CO, rules enacted by the SIX Swiss Exchange) and in soft law (e.g., SCBP for listed companies) and furthermore arise from internal documents of the company (e.g. the articles of association and organizational regulations or directives). The Corporate Bodies are required to observe the following duties when fulfilling their tasks (article 717 CO):

1) **Duty of care**: Corporate bodies need to (i) exercise reasonable skill and care, (ii) ensure that they have enough time (taking into account that the workload may increase significantly in time of crisis), knowledge and experience to meaningfully contribute to the tasks to be fulfilled, and (iv) a basic understanding of the business of the company and the legal framework. Pursuant to precedents of the Swiss Supreme Court, the level of due care is to be determined objectively in each case, i.e., the behavior of the Corporate Bodies will be compared to the behavior that could be expected in the given situation from a reasonable and conscientious person. However, if a Corporate Body has special skills and knowledge in a particular field, a higher standard of care will be applicable. Finally, a Corporate Body might not escape liability by invoking subjective grounds, such as lack of professional skills and knowledge or lack of time.

2) **Duty of loyalty**: Corporate Bodies are required to (i) act in the interest of the company and avoid conflict of interest situation, (ii) generally refrain from acts which are not in the interest of the company (e.g., not to compete with the company or to benefit at the expense of the company), and have (iii) a confidentiality obligation towards the company (in particular in relation to manufacturing or trade secrets), which continues after the end of their offices and the passing of business secrets may even constitute a criminal offense.

3) **Duty to treat shareholders equally**: The principle of equal treatment of shareholders does not require an identical treatment to all shareholders; it must, however, make sure that shareholders are treated equally in comparable circumstances. This principle is of particular significance in
relation to the communication with and information provided to shareholders. Swiss company law provides in this area for a relative rather than an absolute equality, meaning large shareholders might under certain circumstances receive more information than small investors. Whereas company law specifically takes into consideration the circumstances of the specific case, capital market law and stock exchange regulations, namely rules prohibiting insider dealing and ad hoc publicity, provide for a stricter understanding of a 'level playing field' and aim to ensure that price-sensitive information is disseminated on an equal basis. But even then, large (institutional) shareholders often get more information than retail shareholders, which is permissible as long as this information is not price-sensitive or is mitigated by confidentiality undertakings and contractual agreements not to trade on the information received.

Swiss company law does not explicitly contain a duty to avoid damage to the company's reputation. However, such a duty is encompassed in the duty of loyalty. In practical terms, and because these duties are in essence enforced by (the threat of) liability claims, where the claimant has to prove damages, cases brought for "mere" reputational loss or damage are very rare.

11 More generally, are directors required or permitted to consider the company's impacts on non-shareholders, including impacts on the individuals and communities affected by the company's operations? Is the answer the same where the impacts occur outside the jurisdiction? Can or must directors consider such impacts by subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?

See Question 1 above on the necessity to consider also stakeholder interests.

Specific obligations exist according to the CO and the Federal Law on Information and Consultation of Employees in Businesses ("ICL") for the benefit of employees in order to protect their personality rights (e.g., health, both physically and mentally) and to ensure their sufficient involvement regarding certain key matters which notably affect their employment. All formal Corporate Bodies, including directors, have to ensure within their tasks, assigned by law, articles of association, or contract, compliance with these standards. Such obligations include amongst others the following duties:

1) Within the employment relationship, the employer must acknowledge and safeguard the employee's personality rights, have due regard for his health, and ensure that proper moral standards are maintained (article 328 CO). In particular, he must ensure that employees are not sexually harassed and that any victim of sexual harassment suffers no further adverse consequences. In order to safeguard the personal safety, health, and integrity of his employees the employer must take all measures that are shown by experience to be necessary, that are feasible using the latest technology, and that are appropriate to the particular circumstances
of the workplace or the household, provided such measures may equitably be expected of him in the light of each specific employment relationship and the nature of the work. This obligation is subject to an employment agreement under Swiss law between the employee and the employer.

2) The employer must inform the employees at least once per year about the impact of the course of business on their employment, provided that he employs employees in Switzerland (article 9 ICL).

3) The employee representation, or in absence of such institution the employees themselves, benefits from special mandatory consultation rights in the case of mass dismissal and affiliation to an occupational pension scheme, provided that the represented employees are employed in Switzerland (article 335f CO and article 10 ICL).

4) When the employer transfers the company or a part thereof to a third party, including mergers, the employee representation, or in absence of such institution the employees themselves, must be consulted (333a CO).

Apart from the above mentioned duties and the duty of loyalty discussed in Question 1 and 10, there are no additional obligations. A parent company is, e.g., not required to consider the impacts of its subsidiaries (with respect to liability risks due to its influence as a "de facto" director, see also Question 27). As for suppliers and business partners, no special rules apply (but see answer to question 1).

**Other recommendations**

If directors are required or permitted to consider impacts on non-shareholders to what extent do they have discretion in determining how to balance different factors including such impacts? What additional liabilities, if any, do the board or individual directors assume in exercising such discretion?

The Swiss legal framework does not establish explicit rules regarding how to balance different factors during decision-making process, but rather leaves such considerations in the director's discretion, provided that the resolution corresponds with the purpose of the company, as defined in the company's articles of association, with the duty of loyalty, and if a decision is taken with due care.

The Federal Supreme Court clarified that the business judgment rule as known in the US legal system is also a principle of Swiss corporation law. Thereby it confirmed its previous case law, where it had already held that judges should exercise restraint when scrutinizing business decisions and that a liability arises only where a director breaches a duty (see also Question 13).
13 What are the legal consequences for failing to fulfil any of the duties described above; and who may take action to initiate them? What defenses are available?

Liability presupposes: (i) damage suffered by the company or the plaintiff; (ii) a breach of a duty defined by the law, the articles of association, the organizational regulations or other internal directives by the defendants; (iii) acting intentionally or negligently; and (iv) a proximate causation of the breach of duty to the loss sustained.

In connection with the required breach of duty the Swiss Federal Supreme Court now expressly acknowledges that courts have to exercise restraint in the retrospective review of business decisions and only examine whether a business decision was reached in a sound manner; the Court requires that the business decision was (i) taken in a flawless decision-making process, (ii) made on the basis of appropriate information, and (iii) free from conflicts of interest (see also Question 9). In case these prerequisites are met, the court should not review – with the benefit of hindsight – such decision and should neither question it nor hold Corporate Bodies personally liable if the decision later turns out to be wrong. Compliance with these requirements can therefore significantly reduce the liability risk for Corporate Bodies. In the legal literature this decision is regarded as recognition of the “business judgment rule” as a principle of Swiss corporate law.

The plaintiff may be any individual shareholder, the company itself or, in the case of the company’s bankruptcy, any creditor.

As a matter of law, there is joint and several liability of all board members; an individual member of the Corporate Body is, however, exempt from liability provided that there has been no fault at all on his or her side. On the other hand, a Corporate Body may become liable if it becomes aware of a violation and takes no steps to rectify it. Individual allocation of the damage caused to shareholders, the company or, in the case of bankruptcy, to a creditor, is a matter of subsequent recourse claims among the board members.

Can these issues give rise to other causes of action or regulatory routes whereby a stakeholder can exert pressure on a company with regard to its actions?

Failing to comply with its obligation does not give rise to regulatory routes against a Corporate Body; in certain cases, failing to fulfill duties can be a criminal offense, though.

14 Are there any other directors’ duties which are relevant to the interests of stakeholders?

There are no further directors' duties which are relevant to the interests of stakeholders.
For all of the above, if these exist in your jurisdiction, does the law provide guidance about the role of supervisory boards in cases of two tier board structures. What obligations are owed by senior management who are not board directors? Is this determined by law if no specific contractual provision applies?

The statutory default allocation of powers in a company is a one-tier board. However, the possibility to delegate the management of the corporation's business allows for a large degree of flexibility in structuring the organization of a Swiss corporation; it is possible to have on the one side senior management dealing with all operational and day-to-day matters and on the other side non-executive directors who merely supervise and fulfill those duties of the board which are inalienable and nontransferable. This flexibility in the delegation of powers of the board of directors makes it possible to adapt forms of organization such as the US board system, the German system of a supervisory board, and the French system of a Président Directeur General. Such delegation of competences and responsibility requires an authorization in the companies' articles of association and has to be in accordance with the organizational regulation of the board of directors.

In case of a lawful delegation, the members of the board of directors are still liable for the following inalienable and nontransferable responsibilities (note that preparation work for these decisions and items is generally also delegated to senior management):

1) determination of the strategy and the definition of the means to implement it (e.g., budget process, establishment of a business plan, issuance of all necessary directives, and establishment of a risk control and management system);

2) determination of the organization (e.g., decision on the governance structure of the board and management and the organization of the business in business lines);

3) structuring of the accounting system, the financial controls and the financial planning (including monitoring the liquidity of the company);

4) appointment, removal, and succession planning of the members of the management team and the persons authorized to sign on behalf of the company (the appointment of the top executive management must remain with the board, whereas the appointment of the lower hierarchical levels may be delegated);

5) supervision of management (including, inter alia, the implementation of a state-of-the-art internal control system and clear reporting lines), in particular with respect to compliance with the law, the articles of association, and the directives issued by the board;

6) preparation of the annual report consisting of the financial statements (which have to include, inter alia, the significant shareholders and their shareholdings) and a narrative business report;
7) preparation of the shareholders’ meeting (which has to be held within six months after the end of each business year) and the implementation of its resolutions; and

8) notification of the court in the event that the company is over-indebted.

The preparation of the compensation report is also a nontransferable and inalienable duty of the board (see also the detailed discussion in Question 17). Furthermore the members of the board of directors may be held liable for the undiligent choice, instruction or supervision of the senior management.

Since a delegation of responsibility always requires a basis in the organizational regulations, Swiss law does not specifically define the responsibility of the board of directors and senior management in a two-tier board other than the catalogue of inalienable and nontransferable responsibilities of the board of directors.

**Reporting**

16 **Are companies required or permitted to disclose the impacts of their operations (including stakeholder impacts) on non-shareholders, as well as any action taken or intended to address those impacts? Is this required as part of financial reporting obligations or pursuant to a separate reporting regime? Please specify for each reporting route whether it is mandatory or voluntary.**

Generally, there is no such requirement, but there is also no limitation in what companies can disclose.

The financial statements are part of the annual report. These statements contain the annual nonconsolidated accounts (i.e., the financial statements of the individual entity), comprising the balance sheet, the profit and loss account, and the notes to the accounts. Art. 959c CO provides a list of information which must be disclosed in the notes to the accounts. Companies that are required by law to have an ordinary audit (see Question 19 for the prerequisites) must also draw up a management report. The management report presents the business performance and the economic position of the enterprise and, if applicable, of the corporate group at the end of the financial year from points of view not covered in the annual accounts in a narrative way. The management report must in particular provide information on: (i) the number of full-time positions on annual average, (ii) the conduct of a risk assessment, (iii) general information regarding customers' orders, (iv) research and development activities, (v) extraordinary events, and (vi) future prospects.

A company might decide voluntarily to disclose additional information regarding the impact of its operations on non-shareholders.

Issuers of equity securities which have their primary or main listing on the SIX Swiss Exchange must publish their whole annual report in order to maintain their
listing. Furthermore, any issuer must, according to the SIX Listing Rules, disclose any price-sensitive facts which have arisen in its sphere and are not public knowledge, including a material change in the earnings situation and changes in the course of business. This is called Ad hoc-Publicity. Failing to comply may result in delisting or fines up to CHF 10,000,000.

17 Please describe any mandatory reporting requirement, major voluntary initiative or trend towards voluntary reporting with regard to transparency (for example, payments to government or state-owned entities, reports on government orders to undertake surveillance or interception, reports on tax payments etc.).

Swiss law does not contain rules for disclosure of payments to governments or state-owned entities or for disclosure of government orders to undertake surveillance or interception. Disclosure of tax payments is required (on a separate line in the P&L) by the applicable accounting standards.

The Ordinance against Excessive Compensation in Listed Companies obliges companies limited by shares having their seat in Switzerland and their shares listed in Switzerland or abroad to annually submit the top management’s compensation to the shareholders for a binding vote and contains far-reaching new rules on corporate governance with direct effects on boards, executive management, shareholders, pension funds, and independent proxies. It also outlaws certain payments such as golden handshakes (but allows to indemnify a new manager for losses suffered with the former employer) and severance payments. The remuneration report must be published according to the mechanism of Art. 958e CO. Moreover, the Ordinance implements the principle required by the Minder initiative (a far-reaching popular initiative for a constitutional amendment in the area of compensation, colloquially called the “Minder initiative against fat-cat salaries”) that certain contraventions to the Ordinance are sanctioned by imprisonment of up to three years and a fine of up to the equivalent of six years’ annual compensation and all offences have to be prosecuted ex officio.

Listed companies are subject to more disclosure obligations governed by stock exchange regulations and must comply with certain accounting standards. For example, the Directive on Information Relating to Corporate Governance ("DCG"), issued on 17 April 2002 by SIX Exchange (formerly SWX Swiss Exchange) contains disclosure obligations for listed companies. In its annex with over 50 separate points, the DCG provides details regarding information of particular importance from a corporate governance point of view. Such information must be published in the annual report.

Furthermore, significant shareholders of listed companies and their participation have to be disclosed in the notes to the balance sheet. Ad-hoc publicity requirements for listed companies and disclosure requirements for important shareholders if their holding crosses certain thresholds (3, 5, 10, 15, 20, 25, 33.3, 50 or
66.6 per cent of voting rights) complement the rather comprehensive framework of disclosure requirements.

The violation of this obligations may be sanctioned by FINMA, e.g. by way of a fine and/or contractual penalty of up to CHF 10,000,000.

18 **Do legal reporting obligations extend to such impacts outside the jurisdiction; to the impacts of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?**

The Swiss reporting regime does not distinguish between events inside or outside the jurisdiction.

Where a legal entity that is required to produce financial reports controls one or more companies that are themselves required to prepare financial reports, this "parent company" must prepare consolidated accounts. A legal entity controls another company if it: (i) directly or indirectly holds a majority of votes in the highest management body, (ii) directly or indirectly has the right to appoint or remove a majority of the members of the supreme management or administrative body, or (iii) it is able to exercise a controlling influence based on the articles of association, the foundation deed, a contract, or comparable instruments. Such subsidiaries may be located in or outside the jurisdiction.

19 **Who must verify these reports; who can access reports; and what are the legal or regulatory consequences of failing to report or misrepresentation? Is there a regulator tasked with investigating complaints of misreporting?**

Article 727 CO provides that the following companies must have their annual accounts and, if applicable, their consolidated accounts reviewed by an auditor in an ordinary audit:

1) publicly traded companies, which are defined as companies that have either shares listed on a stock exchange, have bonds outstanding (or contribute at least 20 per cent of the assets or of the turnover to the consolidated accounts of such a company);

2) companies that exceed two of the following thresholds in two successive financial years: (i) a balance sheet total of 20 million Swiss francs, (ii) sales revenue of 40 million francs, and (iii) 250 full-time positions on annual average; and

3) companies that are required to prepare consolidated accounts.

If the requirements for an ordinary audit are not met, the company must have its annual accounts reviewed in a limited audit.
With the consent of all the shareholders, a limited audit may be dispensed with if the company does not have more than 10 full-time employees on annual average.

Publicly traded companies must appoint an audit firm qualifying for this work under the Auditor Oversight Act of 16 December 2005. Other companies that are required to have an ordinary or limited audit must appoint a licensed audit expert under the Auditor Oversight Act of 16 December 2005.

Shareholders are entitled to access these reports. Furthermore, article 958e CO provides that the annual accounts and consolidated accounts together with the audit reports of listed companies or companies which have outstanding bonds must either be published in the Swiss Official Gazette of Commerce or sent as an official copy to any person who requests them. The annual report and the audit reports of other companies must be disclosed, provided that a creditor has a legitimate interest to inspect. Additional disclosure obligations are governed by stock exchange regulations. Issuers of equity securities which have their primary or main listing on the SIX Swiss Exchange must publish the following reports in order to maintain listing:

1) the annual report, including financial statements and the audit report, and
2) the semi-annual report.

The violation of any of these provisions may be sanctioned by SIX, e.g. by way of a fine and/or contractual penalty of up to CHF 10,000,000. Failing to comply with these provisions may also trigger delisting of the respecting company.

Intentional misreporting by listed companies is, according to article 45 FINMAG, sanctioned with imprisonment up to three years or fines. Negligent misrepresentation is sanctioned with fines up to CHF 250,000.

**What is the external assurance regime for reporting on a company’s impacts on stakeholders? Please specify any mandatory requirements and also where reporting is voluntary what the current market practice is as regards third party assurance.**

As discussed under Question 17 there are no such explicit mandatory requirements and no mandatory external assurance regime.

**Please summarize any regulatory guidance on reporting that relates to impacts on non-shareholder stakeholders.**

Under Swiss law there is no explicit mandatory financial reporting requirement relating to non-shareholder stakeholders. Nevertheless, such requirements might be, depending on the company’s field of practice, implicitly included in, e.g., the management report as part of the risk assessment.
**Stakeholder engagement**

21 **Are there any restrictions on circulating shareholder proposals which deal with impacts on non-shareholders, including stakeholder impacts?**

The main restriction comes from the fact that shareholders proposals have to limit themselves to questions which are in the competence of shareholders. In the past, proposed resolutions, e.g., not to do business in certain areas, have not been admitted to vote on grounds that this was a question reserved to the board of directors.

Apart from this, there are no such restrictions under Swiss law; inter alia, since shareholders have no duty of care and no duty of loyalty, they are free to circulate shareholder proposals. As for members of the board of directors, their duty of loyalty might impose certain bounds to such liberty, e.g., when the shareholders’ proposal discloses trade secrets.

22 **Are institutional investors, including pension funds, required or permitted to consider such impacts in their investment decisions? What is the legal duty that pension funds owe with regard to investment decisions in this regard?**

In Switzerland, institutional investors such as pension funds, the social security system, and insurance companies are significant shareholders in many companies; very often, however, they do not exercise their voting rights. Various attempts have been made to induce institutional investors to get more involved and to exercise their shareholder rights. In line with this, on 21 January 2013, guidelines for the exercise of participation rights by institutional investors were enacted. Generally, investor protection and shareholders advisory organizations have become more important in Switzerland. The Ordinance now contains an obligation for pension funds to exercise their votes in listed companies with respect to motions contained in the invitation to the shareholders’ meeting concerning specific matters, such as, for example, the election of board members.

There is no obligation of institutional investors to consider non-shareholder impacts in their investment, but they might do so voluntarily. Generally, they must apply - as a guiding principle - ordinary diligence and safeguard, when voting, the interests of their beneficiaries, which inter alia means that they should vote with a long-term value creation strategy in mind. There is also a duty to avoid conflicts of interest.

**How does the legal duty of the fund align with term and contractual performance criteria of fund managers – does this facilitate or deter consideration of such impacts?**

As mentioned above, fund managers generally can take into account long term impacts in their decision making; there is no obligation to seek short-term gains when making investment or voting decisions.
Can non-shareholders address companies’ annual general meetings?

The annual general meetings ("AGM") is not a public event in Switzerland. The CO does only provide a right for non-shareholders to attend or speak at shareholders meetings regarding directors (article 702a OCO) and, under certain circumstances, external auditors (article 731 CO) of a company. However, the articles of association can provide such right for other non-shareholders as well. Furthermore, the board of directors can invite non-shareholders to the AGM (e.g., representatives of the media). Furthermore, shareholders may appoint representatives which are entitled by power of attorney to perform their shareholder rights at the AGM.

In practical terms, many NGOs in Switzerland hold one share in those companies they take an interest in order to be able to speak at the AGM.

What is the minimum shareholding required for a shareholder to raise a question at a company’s AGM?

One share is sufficient.

Article 697 CO provides that at the general meeting, any shareholder is entitled to information from the board of directors on the affairs of the company and from the external auditors on the methods and results of their audit. The information must be given to the extent required for the proper exercise of shareholders' rights (which is often a reason not to go into details when questions are of a more general nature). Answers may also be refused where providing them would jeopardize the company's trade secrets or other interests warranting protection. When information is refused without just cause, the court may order it on application.

Other issues of corporate governance

Are there any other laws, policies, codes or guidelines or standards applied in the context of particular contractual relationships (for example project finance) or through adherence to particular sustainability principles (for example the UN Global Compact, the OECD Guidelines for Multinational Enterprises ("OECD Guidelines") etc.), related to corporate governance that might encourage companies to consider in a structured way their impacts upon and the interests of their wider stakeholders including through a stakeholder engagement process?

The State Secretariat for Economic Affairs takes the position that the State plays only a secondary role in this area and can only promote CSR by sensitizing businesses to the concept and helping them to implement measures and encouraging specific initiatives, thus providing guidelines and incentives for appropriate behavior.

CSR as applied by Swiss companies in Switzerland is based on three key instru-
ments: (i) the OECD Guidelines for Multinational Enterprises (2011), (ii) the ILO declaration for multinational enterprises, and (iii) the UN Global compact.

The Global Compact Network Switzerland - with members such as UBS Holding AG, Credit Suisse Group AG, and Nestlé SA - after extensive considerations and discussions, has entered into a collaboration agreement with the Swiss Council for Development and Cooperation. This agreement is limited to a three-year period with potential renewal thereafter. This collaboration aims to revitalize the Swiss Local Network’s activities and expand its field of engagement and sets a strong focus on the Ruggie framework (“Protect, Respect and Remedy”) as the center of action for 2015. A secondary focus is on anti-corruption. Furthermore, a Stakeholder Council - a consultative body manned by a balanced representation of interests - will act as a sounding board to enhance the Network’s credibility, transparency, and effectiveness.

Legal entities may also commit voluntarily to the SCBP. Although these guidelines do not include any commitment on taking account of stakeholders’ interests, the recommendations regarding decision making-process of the board of directors and transparency may bear advantages for non-shareholders as well.

In addition, some companies have formed private initiatives to develop CSR relating to a specific issue or sector.

25 **Are there any laws requiring representation of particular stakeholder constituencies (i.e. employees, representatives of affected communities) on company boards?**

Swiss company law does not provide such mandatory representation of stakeholders on the board of directors, except for article 709 CO which states that the articles of association may contain special provisions to protect minorities or specific groups of shareholders, which also applies to employee shareholders. But the term "minority" as used in this provision only refers to shareholders and does not include other stakeholders.

For pension funds in the sense of article 48 of the Federal Law on Employee Old-age, Surviving Dependents and Disability Provision (“FPL”), which must be incorporated as associations in the sense of article 60 of the Swiss Civil Code (“SCC”) or as legal entities under public law, special representation obligations apply. Article 51 FPL stipulates that the supreme governing body of such associations or entities under public law must be composed equally of members of representatives of both, employers and employees. This shall ensure, that the interests of the insured employees are sufficiently protected.

26 **Are there any laws requiring gender, racial/ethnic, religious or other stakeholder constituencies (i.e. employees, representatives of affected communities) on company boards?**

As to date there are no such regulations, particularly there is no quota for wom-
en's representation on the board of directors or in senior management

From a broader perspective, however, the Swiss legal framework provides several safeguards against discrimination on the basis of gender, race/ethnicity, and religion, such as, for instance, the Federal Act on Gender Equality, which states in article 3 that employees must not be discriminated against on the basis of their sex, whether directly or indirectly.

27 In your jurisdiction is there any legal route whereby a parent company can incur liability with regard to the impacts that one of its subsidiaries has had on stakeholder groups? Are there any serious proposals to impose such responsibility?

As discussed under Question 6, the principles of "limited" liability" and "separate legal personality" are cornerstones of Swiss company law. Even within a group, these principles still apply and the legal independence must generally be respected. Case law knows certain exceptions:

1) **Piercing the corporate veil:** Courts may decide on a case-by-case review to pierce the corporate veil if the conduct in question is a manifest abuse of rights in order to achieve unlawful goals or to damage legitimate third-party rights.

2) **De facto Corporate Bodies:** According to article 754 CO all persons involved in the management of the company can be held liable for their conduct. This applies not only to formally appointed persons, but also, e.g., a parent company, provided that its influence on the decision-making process of the management is "material" or a "de facto" similar to an appointed Corporate Body. According to case law, a de facto Corporate Body actually makes decisions which are theoretically reserved to formally appointed Corporate Bodies, or it actually carries out the management and thus has a real influence on the decision-making of the company. However, no liability arises if a parent company limits itself to exercise its shareholders' rights and merely issues directives regarding group aims, provided the subsidiary has sufficient freedom in determining how to achieve such aims.

3) **Liability arising from trust created in a group:** An additional base for a liability claim against parent companies might arise out of the parent company's conduct during the negotiation of agreements between its subsidiary and a third party, provided that the latter relied on the conduct of the parent company and in good faith on the performance of the parent company. In other words, the parent company must inspire a specific and justified trust in the contractual party in connection with the conclusion of an agreement by the subsidiary, that the parent company will back its subsidiary or it will ensure that the subsidiary's obligations are fulfilled in accordance with its contractual obligations.

As to date, no serious proposals were brought forward to impose any additional liability on parent companies for the conduct of their subsidiaries.
28 Are you aware of any incoming law proposals that are relevant to the issues raised in this questionnaire? If so please describe, providing an indication of the anticipated date the legislation will come into force or be adopted.

A rather fundamental revision of the Swiss company law is currently under review by the legislature. One of its main goals is to further strengthen corporate governance rules, in particular relating to shareholders’ rights and board and management compensation. While a part of this revision (i.e., the accounting provisions) entered into force on 1 January 2013, the governance provisions are still being hotly debated. A preliminary draft of the revised CO was recently undergoing a consultation process which concluded on 15 March 2015. While considerable amendments to the Preliminary Draft are to be expected as a result of this process, it indicates the direction the revision is likely to take.

A major part of the revision is the implementation of the “Ordinance against Excessive Compensation in Listed Companies” into formal law, but the project also contains gender quota rules (on both the supervisory board level as well as in senior management) and further transparency rules for companies active in the commodity sector, where inter alia a reporting on payments to governmental authorities would become required.