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RU: When it comes to proxy access, the support of one third of the votes for NBIM's binding proposal at Wells Fargo, CME Group, Western Union, and Charles Schwab, and support from a majority of the votes for the advisory proposals at Nabors Industries and Chesapeake clearly shows investor support for proxy access. A successful company board should welcome proxy access. The voting this year was only the first step toward providing shareholders with proxy access rights and we expect well-functioning and accountable boards to take proactive steps to implement clearly-stated shareholder requests.

The so-called shareholder spring, seen mainly in the UK, has been very interesting to follow: pay-related votes and pay plans voted down, especially at large banks. There were also many pay reports voted down in the US.

MP: What do you think the key take-away should be for issuers?

RU: A well-functioning board should not fear proxy access, it should welcome it. We expect well-functioning and accountable boards to take pro-active steps to implement clearly-stated shareholder requests.

Notes

1 With the assistance of Jonathan Salzberger, Jennifer Shotwell, Scott Winter, Larry Miller and Arthur Crozier, Innisfree M&A Incorporated.

How activist shareholders may profit from proposed changes to Swiss corporate law

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Corporate law determines the ways and means by which shareholder activists can pursue their strategies. A recent amendment to Swiss corporation law, if enacted, will not only complement Swiss corporate law with new, more restrictive regulation regarding management compensation, but also with various new corporate governance rules. These new rules have the potential to improve the position of activist shareholders in a proxy fight against the board of directors.

Introduction

At the beginning of 2012, the Swiss Federal parliament adopted a bill to amend Swiss corporate law that includes new rules on corporate governance. Over the last ten years, there had been a panoply of legal proposals to overhaul the current Swiss corporate law and a few amendments to specific rules have actually become law. The new bill comes in the wake of a popular initiative to amend the constitution which, if accepted by the electorate, would put drastic limits on management compensation. Swiss citizens will vote on the initiative in early 2013. The new act is a parliamentary counterproposal to the popular initiative and is intended to induce the people to reject the initiative in the referendum. Thus, the new act is an attempt to address and accommodate some of the concerns of the initiative while retaining an overall more liberal approach. The main focus of the new act is on board and management compensation, but it also includes rules regarding corporate governance which, if enacted, will likely affect the balance between activist shareholders and the board of directors. The new act is targeted mainly at publicly listed companies.

Shareholder activism is a multifaceted term. Typical shareholder activists are hedge funds with an activist strategy aimed at increasing their profits by boosting a company's share price or calling for dividend payments. Yet, it is not only the self-serving hedge funds but, in a broader sense, also the shareholders (that increasingly populate Swiss general meetings) actively pursuing idealistic goals such as fostering sustainability or exercising

shareholders' rights as a purpose on its own that can also be considered to be activist shareholders. A recent example of classic shareholder activism in Switzerland was the hedge fund Elliott Advisors' contentious, but unsuccessful, attack on Actelion AG.

A shareholder activist will be fighting on several front lines, including campaigning in the media, applying direct pressure to the board, and also by utilising litigation. Thus, the guide rails of corporate law, among other things, determine how successfully activists can pursue their goals.

Mobilising shareholder votes

As part of their strategy, shareholder activists will try to mobilise shareholder votes and solicit proxies supporting the activists' proposals at the company's general meeting. Several provisions of the new act have the potential to facilitate such mobilisation.

The new act places an obligation on pension funds to exercise their shareholder rights. This obligation will be a public law duty. Thus, a shareholder activist will not have an actionable right to directly enforce this provision or to claim damages in case of breach. Nevertheless, an activist may be able to put informal pressure on pension funds to exercise their shareholder rights by pointing out the pension funds' legal duties.

Under the current law, a company already has the option, in addition to holding a general meeting in person, to hold the meeting simultaneously on-line. This was seen in practice when the shareholders of Aryzta AG were also able to vote on-line at the last general meeting. The new act will explicitly provide for supplemental on-line participation at general meetings, but unfortunately, the new rules are too restrictive and will most likely hamper a fast implementation. For instance, in the future an on-line meeting will only be permitted if explicitly provided for in the company's articles of association. Further, even if provided for in the articles, in the absence of a provision to the contrary, it will be in the discretion of the board of directors to decide on a case-by-case basis whether or not to hold a supplemental on-line meeting. A board may, for example, waive an on-line meeting if it expects to be disadvantaged in a fight with an activist shareholder. While this decision could be challenged under certain circumstances, a board can cite several good justifications for avoiding a supplemental on-line meeting since an on-line meeting not only entails additional costs and logistics, but the board will also be liable for any damages caused by technical failures of the on-line system. Thus, a company that intends to strengthen shareholders rights should provide for mandatory supplemental on-line meetings in its articles of association.

Collecting proxies to obtain majorities

Today's system of formalised institutional proxy voting under Swiss law strongly favours the board of directors. There are currently three types of institutional proxy: the independent proxy, the board proxy and the custodian proxy, all of which tend to vote in favour of the board's proposals. This is because the default for the independent proxy is to vote with the board and by virtue of law the board and custodian proxies have to vote with the board. Consequently, under the current law, activists are almost never able to get a majority and nay votes in the range of 20 per cent will already be considered a partial success. The new act provides that there will be only one form of institutional proxy: the independent proxy. The independent proxy has to be elected by the general meeting, must only vote pursuant to the specific instructions of the shareholders and must abstain from voting in the absence of specific instructions. The likely result is that under the new act there will be fewer votes in favour of the board and the chances for an activist to muster a majority will increase. It is still of course open to the board to try and nudge the shareholders in the direction sought by the board when preparing the invitation to the general meeting and drafting the proxy forms.

Also still in favour of the board is the fact that if new proposals are presented at the meeting itself that have not been reflected in the proxy forms the new default rule provides that, in the absence of specific instructions, the independent proxy must vote with the board. The board could manipulate this default rule in its favour in a contentious situation by modifying the proposals at the meeting. A more consequent approach would have been for the legislature to either place the duty on the independent proxy to abstain from voting or the duty to dismiss such proposals. If abstention were the default, the shareholders absent, but represented by the independent proxy, would be treated like any other absent shareholder. If the default position were to dismiss, the status quo would be favoured and hasty decisions avoided which would be in the

interests of all shareholders.

Under the current law, abstentions are counted as nay votes in the absence of a specific provision in the articles to the contrary. Under the new act, only votes cast (either as aye or nay votes) will be counted to determine the necessary majority with abstention as a third neutral option. The independent proxy, for instance, must abstain from voting in the absence of specific instructions (save in the case of new proposals brought forward at the meeting). For an activist abstentions may be better than votes against its proposal since at least the number of votes required in favour of its proposal is lowered. Thus, by abstaining from voting, a shareholder could still help an activist without openly supporting it.

New points of attack

The new act will create new possible points of attack against the board for activist shareholders.

To reach their strategic goals, shareholder activists often try to force fast changes in the board of directors. The new act will facilitate this. Firstly, the board will have to be re-elected on an annual basis unless the articles provide otherwise; secondly each board member will have to be elected on a separate ballot; and thirdly the chairman will have to be appointed by the shareholders. However, the new rules are only default rules: to fend off activists or discourage hostile takeovers, a company may still provide in its articles of association for tenures of up to three years and for staggered elections.

Activists may initiate litigation to attack the board or the company. Even with limited chances of success, the nuisance value of litigation may entice the board to accept certain propositions of the activist. The new act creates new points of attack:

Each shareholder will be able to challenge violations of a company's compensation regulations in court. Given the high complexity of the new rules on management compensation, there will be plenty of situations that could be deemed to be violations of the rules and, thus, be the basis for a claim. Also, if the activist can put a spin on such a procedure so that it is seen as a fight against excessive management compensation, this might gain public favour.

Under the new act, the general meeting may initiate a claim for breach of directors' duties. Even if the activist cannot muster a majority for such a proposal, the simple act of putting the item on the agenda and raising its discussion might in itself have a favourable effect on the campaign.

Conclusion

The new act – if enacted – will shift the balance slightly in favour of shareholder activists and away from the board. In particular, the fundamental changes of the current rules regarding formal proxies might facilitate solicitation of votes. Otherwise, the board will keep its powerful position. Also, several of the new rules provide that a company may opt out of them (such as annual elections of the board) or waive them (such as on-line voting). Accordingly, upon enactment of the act, Swiss companies wishing to maintain defences against unfriendly takeovers should consider incorporating relevant changes to their articles and procedures.