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Soft law for institutional investors

Introduction to and evaluation of the «Guidelines for institutional investors governing the exercising of participation rights in public limited companies»

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I. Introduction

In January 2013, a group comprising the Swiss Association of Pension Fund Providers ASIP, the Swiss Federal Social Security Funds OAI/II/IC, *economiesuisse*, Ethos, the Swiss Bankers Association and SwissHoldings, published the «Guidelines for institutional investors governing the exercising of participation rights

in public limited companies» (hereafter referred to as *Guidelines* or abbreviated as *GLII*). In the words of the publishers, the Guidelines describe «best practices relating to the exercising of participation rights»¹ by institutional investors in Swiss public limited companies². They follow an international trend, according to which shareholders – and specifically institutional investors – shall accept greater responsibility than hitherto, by means of voluntary best-practice codes of conduct as an essential element in the corporate governance frameworks of listed companies. The international forerunner of this idea was – as with the best practice codes for listed companies limited by shares – the UK³. Its origins go back to the year 2002, when the Institutional Shareholders Committee (ISC) published principles on the responsibilities of institutional investors for the first time, and which were converted into a Code in 2009. Finally, in the year 2010, the Financial Reporting Council, as the sponsoring organisation of the «UK Corporate Governance Code»⁴, also took over the responsibility for this Code, which it published under the title «The UK Stewardship Code»⁵

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¹ Guidelines for institutional investors governing the exercising of participation rights in public limited companies of 21 January 2013 (GLII), Basel/Berne/Geneva/Zurich 2013, Context, 2.

² GLII (note 1), 2.

³ See also CHRISTOPH B. BÜHLER, who considers the British corporate governance codes as worldwide precedent-setting (CHRISTOPH B. BÜHLER, «Swiss Code of Best Practice for Corporate Governance»: Anpassungsbedarf im Spiegel der internationalen Entwicklung, *GesKR* 2011, 478).

⁴ The UK Corporate Governance Code of the Financial Reporting Council, London 2012.

⁵ The UK Stewardship Code of the Financial Reporting Council, London 2010. The UK Stewardship Code, in parallel with the UK Corporate Governance Code, was already updated for the first time in 2012 and the second edition has been available since September 2012. The following references to the UK Stewardship Code therefore refer to the newer edition of September 2012.

and which altogether contains seven principles concerning the behaviour of institutional investors⁶.

II. Structure of the Guidelines

The Guidelines consist of several components that are not co-ordinated with one another in the sense of a continuously ordered system, which leads to some difficulties in orientation as well as in citation. The Guidelines are composed of the following parts:

- i) a short chapter «Scope of application»;
- ii) five basic principles, supplemented by a guiding principle («Institutional investors assume certain responsibilities in the exercising of their participation rights»);
- iii) «notes» on the guiding principle (now referred to under «Preamble») and on the five basic principles;
- iv) a «glossary», which defines the terms «clients», «equity securities», «institutional investors» and «participation rights»;
- v) a separately paginated «context», which, in essence, contains comments on the goal and purpose as well as the background to the Guidelines.

III. Statement of the problem and definitions

1. The central role of the shareholder in the corporate governance system: the double principal-agent problem

Anyone studying the corporate governance system of a listed company from a perspective shaped over many decades would wonder why, all of a sudden, people are focussing on the shareholders and establishing rules concerning shareholder behaviour. According to dogma, shareholders have no obligations to the company⁷, apart

from the obligation to pay up the subscribed shares, and they may do as they please with their rights⁸, indeed they may pursue their own interests without any inhibitions, whether this is to the benefit or detriment of the company⁹; and they may also be irresponsible, self-serving and opportunistic¹⁰. For many years the big corporate governance problem in public companies with a widely distributed shareholder base has been seen in the organisationally given separation of ownership and company management – the famous *principal-agent problem*¹¹, representing the root of all evil that every means has been tried over the years to handle. So why is there now a guideline for institutional investors that talks about the *responsibility* of shareholders? Why a UK Stewardship Code, that contains multiple mentions of the term *Stewardship Responsibility*?

The answer is twofold: on the one hand it has to do with moving the shareholders more towards taking a responsible position in order to deal with the principal-agent problem. If you want to turn the problem into a solution, it is not enough just to tackle the agent's side of things, as has been done up to now by means of increased transparency and accountability as well as a reduction in authority in favour of the shareholders. What is needed much more in this instance are shareholders who use the additional information and participation rights in order to challenge the company and its management, to become involved in a lasting way and to have an impact on the corporate governance of the company¹². In short: it is

⁶ See UK Stewardship Code (note 5), 2, on the development of the UK Stewardship Code. In 2004, in its Principles of Corporate Governance, the OECD published provisions for institutional investors that require institutional investors to disclose (a) their overall corporate governance and voting policies regarding their investments and (b) how material conflicts of interest that may affect the exercise of key ownership rights with respect to their investments are managed (OECD Principles of Corporate Governance, 2004, 19). The Netherlands also has corporate governance rules concerning duties of shareholders, see sec. IV.4 of the Nederlandse corporate governance code (Dutch Corporate Governance Code of the Corporate Governance Code Monitoring Committee, 2008, available at <<http://www.commissiecorporategovernance.nl/download/?id=606>>, 33 et seq.).

⁷ See, e.g., PETER FORSTMOSER/ARTHUR MEIER-HAYOZ/PETER NOBEL, *Schweizerisches Aktienrecht*, Berne 1996, § 42 N 2 and 8 et seq.; ROLAND VON BÜREN/WALTER A. STOFFEL/ROLF H. WEBER,

Grundriss des Aktienrechts, 3rd ed., Zurich/Basel/Geneva 2011, N 973; BSK OR II-KURER/KURER, Art. 680 N 7 et seq.

⁸ In this sense HANS-UELI VOGT, *Aktionärsdemokratie*, Zurich/St.Gallen 2012, 27 et seq.

⁹ ANDREAS VON PLANTA, *Sind die Aktionäre wirklich Eigentümer der Gesellschaft?*, in: Oertle/Breitenstein/Wolf/Diem (eds.), *M&A – Recht und Wirtschaft in der Praxis: Liber amicorum für Rudolf Tschäni*, Zurich/St.Gallen 2010, 403.

¹⁰ VOGT (note 8), 27, with further references; HANS-UELI VOGT/EMANUEL SCHIWOW/KARIN WIEDMER, *Die Aktienrechtsrevision unter Corporate-Governance-Aspekten*, AJP 2009, 1386; in the same sense PETER BÖCKLI, *Schweizer Aktienrecht*, 4th ed., Zurich/Basel/Geneva 2009, § 1 N 152.

¹¹ See fundamentally ADOLF A. BERLE/GARDINER C. MEANS, *The Modern Corporation and Private Property*, New York 1932; MICHAEL C. JENSEN/WILLIAM H. MECKLING, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, *Journal of Financial Economics* 1976, 305 et seq.; see also BÖCKLI (note 10), § 14 N 18 et seq.; GION GIGER, *Corporate Governance als neues Element im schweizerischen Aktienrecht*, Diss. Zurich, Zurich/Basel/Geneva 2003, 31 et seq. (= SSHW 224). The principal-agent issue is intensified by the problem of shareholders' indolence or rational apathy in cases where there is an atomised shareholder structure (*Collective Action Theory*); see MANCUR OLSON, *The Logic of Collective Action: Public Goods and the Theory of Groups*, Cambridge 1965; KARIM MAIZAR, *Die Willensbildung und Beschlussfassung der Aktionäre in schweizerischen Publikumsgesellschaften*, Diss. Zurich, Zurich/St.Gallen 2012, 195 et seq. (= SSHW 308); VOGT (note 8), 37 et seq.

¹² See Green Paper of the European Commission, *The EU corporate governance framework*, COM(2011) 164/3, 3 et seq.; YANNICK HAUSMANN/ELISABETH BECHTOLD-ORTH, *Corporate Governance in Europa: Quo vadis?*, GesKR 2011, 363 et seq.

not enough to simply give shareholders more rights, they also need to make use of them¹³. And in connection with this, the immediate next question is, in whose interest the shareholders act using the rights that belong to them: in a purely selfish way, or in the interests of the enterprise in the longer term? Ultimately, the shift of power in favour of the shareholders can only lead to better results for the corporate governance of the enterprise if the shareholders, with their newly acquired power, do not act in a different way from the board of directors: that is, in the best interest of the company or the enterprise, which for the most part, although by no means exclusively, corresponds with the interests of the shareholders¹⁴.

Second, the answer lies in a second principal-agent problem, which until recently was almost completely hidden in the literature. When we talk about the interests of shareholders, to which shareholder, which principal and which interests are we referring? Hitherto it has been widely and implicitly assumed that the person who exercises the shareholder's rights is also the principal. While this is usually the case for non-listed companies, the situation in the case of many listed companies is completely different: only a minority of the economic beneficiaries hold the shares as their own property and exercise their participation rights. The majority of the shares of many listed companies are held by people who are not the economic beneficiaries, for example, equity funds, pension funds, the Swiss Federal Social Security Funds OAI/II/IC, insurance companies or nominees¹⁵. Suddenly, however, the principal-agent question arises at a higher level, affecting the relationship between the steward, who is the

formal, legal owner of the shares and who exercises the rights that are attached to them, and the economic owner of the same shares. In this context, we also speak of the problem of *separation of ownership from ownership*¹⁶. This problem is further aggravated when institutional investors rely on the services of proxy advisors¹⁷.

If corporate governance in public companies is to be further improved, it is essential that shareholders who have been permitted greater power also accept an increase in their obligations – short term and in a first step by means of non-binding soft law, and in the medium term probably also by means of moderate legal regulations.

2. «Institutional investors», «clients» and «participation rights»

Central to the Guidelines and principles are the terms «institutional investors»¹⁸, «clients» and «participation rights», which are defined in the glossary to the Guidelines as follows:

«Institutional Investors» are «investors who are entrusted with the mandate of holding equity securities for clients on a fiduciary basis»¹⁹. The distinguishing characteristic of this specific category of investors, who act in a way as «capital collection vehicles», is the fact that the parties who have legal ownership of the rights attached

¹³ The axiom that pursuant to art. 680 of the Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations, CO; SR 220), a shareholder of a Swiss company limited by shares has no obligations, apart from the obligation to pay up the subscribed shares, has not been true for some time in respect of companies with listed shares. For instance, the Federal Act on Stock Exchanges and Security Trading of 24 March 1995 (Stock Exchange Act, SESTA; SR 954.1) has contained notification obligations since 1998 (art. 20 SESTA) and even obliges shareholders of listed companies to acquire equity securities (art. 32 SESTA). Thus, the criticism expressed by HERBERT WOHLMANN in the *Neue Zürcher Zeitung* of 16 February 2013, that the Guidelines are incompatible with the fundamental principles of the Swiss law on companies limited by shares as those principles, in HERBERT WOHLMANN's opinion, disapprove of any compulsory duties of shareholders, even if such compulsion arises out of self-regulation, is unfounded (see MICHAEL FERBER, *Kritik an neuen Richtlinien für Profi-Investoren*, *Neue Zürcher Zeitung* of 16 February 2013, 30); such an opinion finds no support (any longer) in the current legislation for listed companies.

¹⁴ See PETER FORSTMOSER, *Gewinnmaximierung oder soziale Verantwortung?*, in: Kiesow/Ogorek/Simitis (eds.), *Summa: Dieter Simon zum 70. Geburtstag*, Frankfurt a.M. 2005, 220; ANDREAS BINDER, *M&A-Rechtentwicklungen – Blicke zurück und nach vorn*, in: Müller-Stewens/Kunisch/Binder (eds.), *Mergers & Acquisitions*, Stuttgart 2010, 508.

¹⁵ See, e.g., the shareholder structure of Credit Suisse Group AG per 31 December 2011 (see Annual Report 2011, 143): 56% institutional investors, 11% private investors, 33% shareholders not registered in the share register (which, according to experience, usually consist mainly of foreign institutional investors).

¹⁶ See USHA RODRIGUES, *Corporate Governance in an Age of Separation of Ownership from Ownership*, *Minnesota Law Review* 2011, 1822 et seqq.; LEO E. STRINE JR., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, *Business Lawyer* 2010, 9.

¹⁷ See LEO E. STRINE JR., *Toward a True Corporate Republic: A Traditional Response To Bebchuk's Solution for Improving Corporate America*, *Harvard Law Review* 2006, 1765: «The influence of ISS and its competitors over institutional investor voting behavior is so considerable that the traditionalist will be concerned that any initiative to increase stockholder power will simply shift more clout to firms of this kind – firms even more unaccountable than their institutional investor clients. Thus, the separation of «ownership from ownership» created by the emergence of institutional investors is further exacerbated by the willingness of institutional investors to defer to other agents.» Also, see LUKAS GLANZMANN, *Die «Abzocker-Initiative» und ihre Folgen*, *GesKR Online-Beitrag* 1/2013, 10; HAUSMANN/BECHTOLD-ORTH (note 12), 366 et seq.

¹⁸ In contrast to the English version, in the German version the technical term «institutional investors» is written in capital letters («Institutionelle Investoren»).

¹⁹ GLII (note 1), 7. For a more detailed definition see TILL SPILLMANN, *Institutionelle Investoren im Recht der (echten) Publikums-gesellschaften*, Diss. Zurich 2004, 19 (= SSHW 232); PETER FORSTMOSER, *Exit oder Voice? Das Dilemma institutioneller Investoren*, in: Bucher/Canaris/Honsell/Koller (eds.), *Norm und Wirkung: Beiträge zum Privat- und Wirtschaftsrecht aus heutiger und historischer Perspektive: Festschrift für Wolfgang Wiegand zum 65. Geburtstag*, Berne 2005, 789; STEPHAN WERNLI, *Schweizer Pensionskassen und Corporate Governance*, Diss. Zurich 2004, 26 et seq. (= BIRC 21); HERBERT WOHLMANN/PHILIPPINE BOSSY, *Zum vorgeschlagenen Stimmzwang der Pensionskassen in den Generalversammlungen börsenkotierter Unternehmen*, *Jusletter* of 1 October 2012, N 9.

to equity securities are different from the economic beneficiaries²⁰.

«Clients» in the sense of the Guidelines are defined as «third parties who entrust institutional investors with the fiduciary management of assets, including insured parties and/or beneficiaries in the case of pension schemes»²¹.

«Participation rights» are defined by the Guidelines as «rights which allow the shareholders to participate in company business, notably the right to participate in and vote at the general meeting of shareholders»²².

IV. Scope of application, non-binding character and contents of the Guidelines

1. Scope of application

The Guidelines contain provisions for the exercising of participation rights in Swiss listed companies by institutional investors. Some of the principles may, however, also be applied as the basis for the exercising of participation rights in foreign companies, in companies whose shares are unlisted or in organisations with a legal form other than that of a company limited by shares²³.

The Guidelines include as institutional investors all persons entrusted with the mandate of holding equity securities on a fiduciary basis for clients²⁴; the latter also include insured parties and/or beneficiaries of pension funds. The Guideline's scope of application is therefore substantially wider than that of the provisions concerning pension funds in the Federal Popular Initiative «against rip-off salaries» (*Eidgenössische Volksinitiative «gegen die Abzockerei»*)²⁵ and also wider than that of the provisions concerning pension funds in the indirect counterproposal (*indirekter Gegenvorschlag*)²⁶. In addition to the institutional investors, the Guidelines also allude to proxy advisors, as the Guidelines themselves explicitly state that «institutional investors and proxy advisors» can ascribe to the Guidelines on a voluntary basis²⁷.

2. Non-binding character

The publishers of these Guidelines have designed them in such a way that they are broadly based, and can therefore attain the widest possible acceptance. The Guidelines do not intend to introduce new binding law. The addressees shall abide by the Guidelines, «if they are fundamentally in agreement with the defined principles»²⁸. The Guidelines are an instrument of self-regulation, which, while offering institutional investors and proxy advisors discretionary freedom and suggestions for behaviour, does not intend to restrict their freedom of action in a binding manner. Accordingly, the Guidelines leave it to the individual institutional investors and proxy advisors to abide by the Guidelines and to comply with the stated principles. Thus it is a voluntary commitment²⁹. At the same time, the institutional investors and proxy advisors who comply voluntarily with the Guidelines, insofar as the Guidelines allow them discretionary freedom, may deviate from individual rules³⁰. In keeping with the principle of «comply or explain»³¹, it is however expected that deviation from the principles of the guidelines will be disclosed and justified³². The publishers of the guidelines hope that the voluntary adoption of these rules by institutional investors provides a clear signal that the institutional investors take seriously their responsibilities towards their clients³³. Until now, an open issue remains as to how a declaration of affiliation with the Guidelines will be made.

In our opinion, the self-regulation approach is preferable to binding legal regulation. The methodical «comply or explain» approach is in keeping with contemporary methods and is adequate³⁴. Institutional investors will be allowed some leeway so that they may deviate from the principles of the Guidelines in justified cases.

²⁸ GLII (note 1), Context, 3.

²⁹ DAVID FRICK, *Corporate Governance heute – Revision des Swiss Code of Best Practice*, SJZ 2012, 234.

³⁰ GLII (note 1), Context, 3.

³¹ See, e.g., BÖCKLI (note 10), § 14 N 13 et seqq.; CHRISTOPH B. BÜHLER, *Regulierung im Bereich der Corporate Governance*, Habil. Zurich, Zurich/St.Gallen 2009, N 62 et seq. The principle «comply or explain» is also applicable to the Directive of 29 October 2008 on Information relating to Corporate Governance of the SIX Swiss Exchange (Directive Corporate Governance, DCG), art. 7, to the German Corporate Governance Code (GCGC) of the Government Commission German Corporate Governance Code, 2012, 2, and to the Dutch Corporate Governance Code (note 6), no. 4 of the Preamble. In contrast, the Swiss Code of Best Practice for Corporate Governance (SCBP), Zurich 2007, does not follow the methodical «comply or explain» approach, which no longer corresponds to the best practice standard of corporate governance codes (see BÜHLER [note 3], 484; HAUSMANN/BECHTOLD-ORTH [note 12], 368; Green Paper of the European Commission [note 12], 21; RISKMETRICS GROUP, *Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States of 23 September 2009*, 142).

³² GLII (note 1), 4.

³³ GLII (note 1), Context, 2.

³⁴ BÜHLER (note 3), 484; HAUSMANN/BECHTOLD-ORTH (note 12), 368; Green Paper of the European Commission (note 12), 21; RISKMETRICS GROUP (note 31), 142.

²⁰ SPILLMANN (note 19), 17 et seq.

²¹ GLII (note 1), 7.

²² GLII (note 1), 7.

²³ GLII (note 1), 2.

²⁴ GLII (note 1), 7.

²⁵ BBl 2006 8755 et seqq.; BBl 2008 2577 et seq.

²⁶ Official Bulletin of the Council of States of 16 March 2012, 269 et seq.; Official Bulletin of the National Council of 16 March 2012, 553 et seq.; for further comments on the provisions concerning pension funds in the indirect counterproposal see infra chap. V.2.

²⁷ GLII (note 1), Context, 3.

If a significant number of institutional investors comply with the voluntary commitment that is envisaged in the Guidelines, this can – intentionally – lead subsequently to many more institutional investors feeling compelled to adapt their behaviour in connection with exercising their due participation rights in Swiss public companies in accordance with the Guidelines.

3. Contents

3.1. Preamble: Commitment to certain responsibilities in the exercising of participation rights

The preamble expresses the guiding principle of the Guidelines in a straightforward and concise form: the commitment of institutional investors to certain responsibilities in the exercising of participation rights³⁵.

Institutional investors should be fully aware of their particular responsibilities towards their clients, they should respect the important role they play in ensuring long-term, effective corporate governance of the companies in which they hold equity securities and exercise their participation rights diligently and in the interests of their clients³⁶.

In order to fulfil these responsibilities, institutional investors who agree to abide by the Guidelines are required to comply fully with the principles formulated in the Guidelines, or to explain (in a statement of accountability, which must be accessible to the public and therefore published on the institutional investors' websites) the extent to which they are deviating from one or more of the principles set out in the Guidelines, and the reasons for the deviation³⁷.

The commitment of institutional investors to certain responsibilities in the exercising of participation rights is the guiding principle and as such influences all other principles in the Guidelines. The required commitment of institutional investors emphasised in the preamble is primarily for the benefit of the clients as the institutional investors' principals. The Guidelines, however, also mention the institutional investors' «important role in ensuring long-term, effective corporate governance of the companies in which they hold equity securities»³⁸, which clarifies that institutional investors also bear responsibilities towards the company³⁹.

3.2. Principle 1: Exercising of participation rights

The first principle in the Guidelines requires institutional investors to exercise their participation rights, which means they must be entered in the share register as a shareholder with voting rights, take part in the general meeting of shareholders and exercise voting rights at the general meeting «insofar as this is deemed appropriate and feasible in the interests of their clients»⁴⁰. Exercising participation rights is deemed appropriate and feasible «if the associated expenditure is justifiable and reasonable from the point of view of adequately safeguarding the interests of their clients»⁴¹. This provision aims to counteract the problem of dispo shares⁴², i.e. shares held that are not recorded in the share register.

A problem that has become apparent in recent years is that of securities lending and borrowing⁴³. The term «securities lending and borrowing» refers to a loan agreement in the sense of art. 312 et seqq. CO⁴⁴, in which the lender agrees to lend to the borrower a certain quantity of specified equity securities (or book-entry securities) for a fee and usually against collateral⁴⁵. The borrower becomes the legal owner of the shares and thus acquires the financial rights as well as the participation rights associated with the shares⁴⁶. Meanwhile, however, the lender continues to be the economic beneficiary⁴⁷. This situa-

⁴⁰ GLII (note 1), 4.

⁴¹ GLII (note 1), 4.

⁴² See, e.g., HANS CASPAR VON DER CRONE/TIFFANY ENDER, Dispoaktien und Nominee-Modell, in: Watter (ed.), Die «grosse» Schweizer Aktienrechtsrevision, Zurich/St.Gallen 2010, 135 et seqq. (= SSHW 300); HANS CASPAR VON DER CRONE/MARTINA ISLER, Dispoaktien, GesKR Sondernummer 2008, 76 et seqq.; DANIEL M. HÄUSERMANN, Dispoaktien: Ein 250-Milliarden-Problem?, GesKR 2012, 220 et seqq.; BÖCKLI (note 10), § 4 N 444 et seqq.; IRÈNE SCHILTER, Die Dispoaktienproblematik und das Nominee-Modell als Lösungsansatz, Diss. Zurich, Zurich/Basel/Geneva 2011, 25 et seqq. (= Zürcher Studien zum Privatrecht 230).

⁴³ In regard to Securities Lending and Borrowing see, e.g., URS BERTSCHINGER, Finanzinstrumente in der Aktienrechtsrevision – Derivate, Securities Lending und Repurchase Agreements, SZW 2008, 215 et seqq.; PETER ISLER/PHILIPP HAAS, Securities Lending und Stimmrecht, in: Vogt/Stupp/Dubs (eds.), Unternehmen – Transaktion – Recht: Liber Amicorum für Rolf Watter zum 50. Geburtstag, Zurich/St.Gallen 2008, 211 et seqq.; DIETER ZOBL/STEFAN KRAMER, Schweizerisches Kapitalmarktrecht, Zurich/Basel/Geneva 2004, N 1277 et seqq.

⁴⁴ With regard to the lending and borrowing of book-entry securities art. 312 et seqq. CO find analogous application (ISLER/HAAS [note 43], 215).

⁴⁵ URS BERTSCHINGER, Institutionelle Anleger – Charakter und Governance, in: Nobel (ed.), Aktuelle Rechtsprobleme des Finanz- und Börsenplatzes Schweiz, Berne 2004, 198.

⁴⁶ BERTSCHINGER (note 43), 215; ISLER/HAAS (note 43), 217 et seq. und 222; ZOBL/KRAMER (note 43), N 1291; for registered shares, the entry of the shareholder in the share register is required (art. 686 para. 4 CO), whereas for bearer shares the transfer of title from the lender to the borrower suffices.

⁴⁷ ISLER/HAAS (note 43), 219; see also DIETER DUBS/URS BRÜGGER, Transparenz im Aktionariat durch (objektiv-)geltungszeitliche Interpretation des Art. 685d Abs. 2 OR – Die Offenlegung des wirtschaftlich Berechtigten als Anerkennungsvoraussetzung, SZW 2007, 282 et seqq. Within the collective investment law, the lending of securities is designated as a permitted technique for the man-

³⁵ GLII (note 1), 4.

³⁶ GLII (note 1), 4.

³⁷ GLII (note 1), 4.

³⁸ GLII (note 1), 4.

³⁹ See also DAVID FRICK, Update Corporate Governance, Revision Swiss Code of Best Practice, slides accompanying the presentation held at the 9. Zürcher Aktienrechtstagung of 29 March 2012, 5.

tion is problematic especially when shares are borrowed prior to a general meeting of shareholders with the intention of increasing the borrower's voting power⁴⁸. Conversely, an institutional investor who has lent shares to a borrower is not able to exercise the participation rights associated with lent shares at the shareholders' general meeting as he loses the rights that are associated with the lent shares for the duration of the loan.

The Guidelines therefore rightly provide that institutional investors should specify in their principles the circumstances under which equity securities that have been lent to third parties will be recalled, so that they may exercise their participation rights⁴⁹.

Furthermore, the Guidelines also include, in the notes to Principle 3, a material recommendation on securities lending, to the effect that securities lending prior to a general meeting of shareholders «should be avoided or suspended if there are any controversial items on the agenda that have to be voted on and which could be of relevance in terms of the client's interests»⁵⁰.

3.3. Principle 2: Acting in the interests of clients

Pursuant to Principle 2, institutional investors are obliged to take due account of the interests of their clients when exercising their participation rights. Unless otherwise stipulated in the relevant investment guidelines, institutional investors should adopt a «long-term and sustainable approach»⁵¹. The duty to follow a long-term and sustainable approach in the absence of other provisions in the investment guidelines is new and it qualifies as an

agement of a contractual investment fund or for the SICAV (art. 55 para. 1 of the Federal Act of 23 June 2006 on Collective Investment Schemes [Collective Investment Schemes Act, CISA; SR 951.31]), insofar as it is carried out within the scope of efficient management (art. 76 para. 1 of the Federal Ordinance of 22 November 2006 on Collective Investment Schemes [Collective Investment Schemes Ordinance, CISO; SR 951.311]) and by means of a standardised framework agreement (art. 76 para. 3 CISO).

⁴⁸ See ISLER/HAAS (note 43), 213 and 226 et seq. This problem has also been discovered by the Federal Council, which, in the context of the still pending revision of the Swiss law of companies limited by shares, has proposed a revision of art. 685d para. 2 CO, according to which the company may refuse an acquiring party, if the acquirer does not explicitly declare, when requested to do so, that it has acquired the shares in its own name and on its own account, and – herein lies the proposed innovation – that no agreement exists concerning the withdrawal or return of the respective shares (BBl 2008 1751, 1770; Botschaft vom 21. Dezember 2007 zur Änderung des Obligationenrechts, BBl 2008 1589, 1615 and 1665); see also URS BERTSCHINGER, Aktienrechtsrevision: Vinkulierung und Securities Lending, Repurchase Agreements etc., GesKR Sondernummer 2008, 71 et seqq. On the question of whether the borrowing of shares prior to a general meeting of shareholders in order to obtaining a higher voting power is deemed to be improper vote buying, see ISLER/HAAS (note 43), 226 et seq., with further references.

⁴⁹ GLII (note 1), 4; for comparison see the provision in the UK Stewardship Code: «Institutional investors should disclose their approach to stock lending and recalling lent stock» (UK Stewardship Code [note 5], 9; see also infra chap. V.1).

⁵⁰ GLII (note 1), 5.

⁵¹ GLII (note 1), 5.

essential key message of the Guidelines. For those institutional investors who ascribe to the Guidelines, such a commitment to adopt a long-term and sustainable approach could become a seal of quality⁵².

Moreover, the second Principle of the Guidelines requires institutional investors to define the manner in which they usually exercise their participations rights; however, institutional investors should not adhere rigidly to the defined manner without consideration of the individual situation, and instead should take due account of the specific circumstances of each individual case⁵³. The formation of opinions concerning the exercising of participation rights may take place in the course of appropriate dialogue with involved companies and their representatives⁵⁴.

The notes to Principle 2 emphasise the necessity of acting independently of any political criteria or instructions from third parties. If possible, conflicts of interest should be avoided, but when necessary, institutional investors should disclose them and take appropriate actions in order to overcome them⁵⁵.

3.4. Principle 3: Responsibility for exercising participation rights

The third Principle of the Guidelines underlines the responsibility of institutional investors to exercise the participation rights to which they are entitled, and that cannot be delegated to any third party.

Transfer of the exercising of voting rights, within the scope of an asset management mandate and in accordance with the established guidelines, is still permitted, as is the use of proxy advisors; however, the ultimate responsibility for the exercising of voting rights remains with the institutional investors⁵⁶.

Voting rights representatives and proxy advisors must be selected with care, and they must receive appropriate instruction and be adequately supervised by the respective institutional investor; recommendations made by proxy advisors must be considered critically and analysed carefully so that any potential conflicts of interest can be identified⁵⁷. These duties are the responsibility of the institutional investors. The Guidelines consciously abstain from direct regulation of the duties of voting rights representatives and proxy advisors⁵⁸.

⁵² See already FRICK (note 29), 235.

⁵³ GLII (note 1), 5.

⁵⁴ GLII (note 1), 5; see also sec. 8 SCBP (note 31), 11, according to which the Board of Directors shall also take reasonable steps to stay in contact with shareholders between the general meetings of shareholders.

⁵⁵ GLII (note 1), 5.

⁵⁶ FRICK (note 29), 235; FRICK (note 39), 8.

⁵⁷ GLII (note 1), 5.

⁵⁸ See FRICK (note 29), 235.

Prior to a general meeting of shareholders, securities lending should be avoided or suspended if there are any controversial items on the agenda that will be put to a vote and that may be relevant to the client's interests⁵⁹.

3.5. Principle 4: Disclosure of the principles and processes involved in exercising participation rights

Principle 4 obliges institutional investors to make the principles and processes involved in exercising participation rights transparent to clients. In particular, this includes the so-called «guidelines concerning voting rights». These, together with a description of the processes, must be defined in the form of a written policy, designed in such a way that it is possible to review them effectively. These guidelines should also comment on the question of coordination of the exercising of participation rights with other institutional or non-institutional investors as well as on the use of proxy advisors⁶⁰.

The intended addressees of such guidelines are limited to clients; institutional investors are not required to disclose such guidelines to other shareholders of the company in which they are invested or to the public. However, an institutional investor is free to make the relevant guidelines accessible to the public; and indeed institutional investors with a large actual or potential circle of clients often do this, for obvious reasons⁶¹.

3.6. Principle 5: Accountability

Finally, in Principle 5 the Guidelines require that, at least once a year, institutional investors disclose the manner in which they have exercised their participation rights in the form of an accountability statement. This accountability statement should report on the participation rights which have been exercised and disclose the extent to which the respective institutional investor has assigned the exercising of its voting rights to asset managers, the use of proxy voting services, and the structure of the relevant relationships between the institutional investor, asset managers and proxy advisors⁶². Details regarding voting behaviour in individual cases do not have to be disclosed⁶³. The addressees of the accountability statement are the clients of the respective institutional investor.

V. Evaluation and outlook

1. Comparison of the Guidelines with the UK Stewardship Code

When comparing the Guidelines with the UK Stewardship Code, it should be noted that the former concentrates on the exercising of participation rights (especially voting rights) by institutional investors, while the latter has a broader scope and goes beyond the question of the exercising of voting rights⁶⁴. The UK Stewardship Code emphasises the duty of institutional investors to monitor the companies in which they hold equity securities and to involve themselves in matters such as strategy, performance, risk, capital structure, corporate governance, corporate culture and remuneration policy⁶⁵. The Guidelines lack such an explicit request.

However, the responsible exercising of voting rights, as required by the Guidelines, is hardly ever possible without periodic and effective monitoring. Against this background, it can be assumed without explicit provision, that the Guidelines call implicitly for such monitoring. However, on the subject of institutional investors' involvement in individual companies extending beyond the exercising of voting rights, the UK Stewardship Code anyway goes further than the Guidelines, since it contains, in contrast to the Guidelines, clear statements on the escalation of the stewardship responsibilities of institutional investors (Principle 4) as well as on their willingness to act collectively with other shareholders where appropriate (Principle 5)⁶⁶.

On the other hand, the topic of exercising voting rights is more comprehensively regulated by the Guidelines than it is by the UK Stewardship Code⁶⁷, in that the Guidelines also require institutional investors to exercise their participation rights according to the interests of the client and to that end – except when otherwise stipulated in the investment guidelines – to follow a «long-term and sustainable approach»⁶⁸. Hence, unlike the UK Stewardship Code, the Guidelines contain a substantive statement on the exercising of participation rights. In contrast, the UK Stewardship Code restricts itself on this subject to calling, in Principle 6, for the definition of a clear policy on voting rights and the disclosure of voting rights behaviour, while it is limited in terms of content to the in fact equally formal aspect, according to which the institutional investors should not automatically follow the requests of the board⁶⁹.

⁵⁹ GLII (note 1), 5; see also supra chap. IV.3.2.

⁶⁰ GLII (note 1), 6.

⁶¹ See also GLII (note 1), 4, where the website is mentioned as an alternative to the accountability report as a medium of information for clients.

⁶² GLII (note 1), 6.

⁶³ GLII (note 1), 6.

⁶⁴ See FRICK (note 29), 235.

⁶⁵ UK Stewardship Code (note 5), 1.

⁶⁶ UK Stewardship Code (note 5), 8 et seq.

⁶⁷ See FRICK (note 29), 235.

⁶⁸ GLII (note 1), 5.

⁶⁹ UK Stewardship Code (note 5), 9.

The Guidelines also go further than the UK Stewardship Code with regard to securities lending. The latter states in its notes to Principle 6 merely that institutional investors should disclose their approach to securities lending and borrowing and to recalling lent shares⁷⁰. Apart from this call for disclosure of relevant policy, the UK Stewardship Code does not include any substantive provisions. In contrast, the Guidelines request not only the regulatory definition of those situations in which institutional investors recall equity loans made by means of securities lending to third parties so that they are able to exercise the participation rights attached to them⁷¹, but rather they call upon institutional investors to avoid or suspend the lending of shares whenever possible if there are any controversial items on the agenda of the general meeting of shareholders which could be of relevance in terms of the client's interests⁷².

It can therefore be stated that, in comparison with the UK Stewardship Code, the Guidelines have a narrower regulatory breadth in terms of the exercising of voting rights, but a greater depth in regulatory content.

The UK Stewardship Code requires signatories of the Code to publish on their websites, or to make otherwise accessible to the public, a statement on how they will discharge their stewardship responsibilities (Principle 1), which policy on managing conflicts of interests they follow (Principle 2), and the extent to which they have complied with the seven Principles of the Code; deviation from the rules set out in the UK Stewardship Code must be disclosed and explained⁷³. On its website, the Financial Reporting Council retains a list of all organisations which have published respective statements⁷⁴. However, the Guidelines call for the disclosure and justification of any deviations from the principles contained in the Guidelines either to clients or alternatively to the general public⁷⁵. A positive declaration by institutional investors, to the effect that they have complied with all the principles in the Guidelines, is not required. In addition, the Guidelines do not comment on the question of whether the editors intend to keep a publicly available list of compliant institutional investors or not.

Finally, it should be noted that the Financial Reporting Council, as editor of the UK Stewardship Code, holds a supervisory function with respect to the Code and compliance with it. The Council monitors how the Code is adopted and applied on a regular basis⁷⁶; the insights that result from the Financial Reporting Council's monitoring form the basis for the continuing enhancement of the

UK Stewardship Code. So far, such monitoring is not planned in Switzerland.

2. The Guidelines in the context of the provisions of the Federal Popular Initiative «against rip-off salaries» and of the indirect counterproposal⁷⁷

2.1. Overview

The Federal Popular Initiative «against rip-off salaries» and the indirect counterproposal contain provisions for particular kinds of shareholders that go further than the Guidelines. This means that, in the foreseeable future, additional legal rules will apply to these shareholders. These will be described briefly below, in comparison with the Guidelines. In so doing, a fundamental difference is always to be kept in mind, which is that compliance with the Guidelines by institutional investors is voluntary, and that subject to the Guidelines as the institutional investors may be, they also may deviate from individual rules in accordance with the principle «comply or explain», while by contrast, the law is applicable to all kinds of shareholders covered by it, without taking any account of the circumstances of individual cases.

2.2. Exercising of participation rights

The Guidelines require institutional investors to exercise their participation rights «insofar as this is deemed appropriate and feasible in the interests of their clients», which is the case as long as the expenditure associated with the exercising of the participation rights is justified and reasonable⁷⁸.

The Federal Popular Initiative «against rip-off salaries» only concerns the obligations of the pension funds, and does not affect other institutional investors. For the pension funds, the Popular Initiative provides – at least in principle – a strict duty to vote⁷⁹. As already mentioned

⁷⁷ The Federal Popular Initiative «against rip-off salaries» (*Eidgenössische Volksinitiative «gegen die Abzockerei»*) was accepted on 3 March 2013 by the Swiss electorate and the cantons (see art. 95 para. 3 of the Federal Constitution of the Swiss Confederation of 18 April 1999 [SR 101]). Parliament's indirect counterproposal is therefore obsolete, as its entry into force in accordance with Parliament's decision would require that the Initiative were rejected. However, the text of the indirect counterproposal may enter into the discussion again, in the scope of the Parliamentary debate over the implementation of legislation on the Initiative (in this sense also GLANZMANN [note 17], 2).

⁷⁸ GLII (note 1), 4; see supra chap. IV.3.2.

⁷⁹ See CHRISTOPH B. BÜHLER, *Showdown in der Vergütungsfrage: Volksinitiative «gegen die Abzockerei» oder indirekter Gegenentwurf des Parlaments*, GesKR Online-Beitrag 1/2012, 10; WOHLMANN/BOSSY (note 19), N 1 et seqq., especially N 53; but see GLANZMANN (note 17), 9, who is of the opinion that, at least according to a literal interpretation of the new art. 95 para. 3 Constitution, a requirement for pension funds to vote cannot necessarily be inferred; an obligation to vote under art. 95 para. 3 letter a Constitution can only be presumed if abstaining from voting would harm the inter-

⁷⁰ UK Stewardship Code (note 5), 9.

⁷¹ GLII (note 1), 4.

⁷² GLII (note 1), 5.

⁷³ UK Stewardship Code (note 5), 2 and 6.

⁷⁴ UK Stewardship Code (note 5), 3.

⁷⁵ GLII (note 1), 4; see also supra chap. IV.3.1, IV.3.5 and IV.3.6.

⁷⁶ UK Stewardship Code (note 5), 3.

above, the axiom that the shareholder, according to art. 680 CO, has no obligations with the exception of the duty to pay up the subscribed shares has not been fully applicable in the case of public companies for some time⁸⁰. A voting requirement for pension funds would all the same be an extreme step. It would result in a real paradigm shift in the treatment of a particular type of shareholders and at the same time would treat this type of shareholders differently from other shareholders.

The indirect counterproposal by Parliament sets down that the pension funds should exercise their voting rights in Swiss companies with listed shares as far as is possible (art. 71a para. 1 E-BVG). With this restricted formulation, Parliament decided explicitly against an obligation to vote. The pension funds should exercise their voting rights when it appears to be useful and reasonable to do so, which corresponds approximately with what is stated in the Guidelines⁸¹. The regulation of the indirect counterproposal only concerns pension funds and does not concern any other type of institutional investor.

2.3. Acting in the interests of clients

Principle 2 of the Guidelines obliges institutional investors to exercise their participation rights according to the interests of their clients⁸². For the pension funds, this obligation is also envisaged in the Federal Popular Initiative «against rip-off salaries». In contrast, the indirect counterproposal contains no such stipulation.

2.4. Responsibility for exercising participation rights

In Principle 3, the Guidelines point out that the responsibility for exercising the participation rights to which they are entitled lies with the institutional investors, that they cannot be delegated to any third party, and that institutional investors remain responsible for the exercising of their participation rights even when the exercising of voting rights is assigned to an asset manager within the scope of an asset management mandate or when using the services of proxy advisors⁸³.

This clarification is missing in the Federal Popular Initiative «against rip-off salaries»⁸⁴ as well as in Parliament's indirect counterproposal.

2.5. Disclosure of principles and processes involved in exercising participation rights and accountability

Pursuant to the Guidelines, institutional investors are obliged to disclose the principles and processes involved in exercising participation rights and to issue an accountability statement at least once a year, containing a report on the manner in which they have exercised their participation rights⁸⁵.

The disclosure of exercising voting rights by pension funds is also envisaged in the Federal Popular Initiative «against rip-off salaries»; on the other hand, announcement of the principles and processes used when exercising voting rights is not required. Parliament's indirect counterproposal also obliges the pension funds to disclose how they have voted for the purposes of accountability (art. 71a para. 2 E-BVG), without requiring disclosure of the principles and processes used when exercising voting rights.

Unlike the Federal Popular Initiative and the indirect counterproposal, the Guidelines emphasise that the institutional investors have no obligation to disclose specific details concerning voting in individual cases⁸⁶.

3. General evaluation of the Guidelines and concrete recommendations for their development

3.1. Evaluation

We have come a long way from the decades of the unchallenged and non-discussed axiom that – apart from the duty to pay up the subscribed shares – shareholders are free of obligations, to the idea that a shareholder also bears responsibility for the corporate governance of a company⁸⁷. At the beginning of this path was the worldwide trend towards strengthening shareholder's rights. The shareholder was recognised as a central element in the corporate governance system, and accordingly, we began to grapple increasingly with the shareholder's

ests of those insured. On the issue of the leeway that remains available to legislators in the implementation of art. 95 para. 3 Constitution, see DANIEL M. HÄUSERMANN, *Aktienrechtliche Umsetzung der «Abzocker»-Initiative: Spielraum und Rechtstechniken*, SJZ 2012, 537 et seqq.

⁸⁰ See supra note 13.

⁸¹ In the debate in the Council of States, Federal Council Member SIMONETTA SOMMARUGA even spoke to the effect that, from the Federal Council's point of view, this formulation showed «absolutely no normative character» and therefore does not belong in an act; see Official Bulletin of the Council of States of 12 September 2011, 732.

⁸² GLII (note 1), 5.

⁸³ GLII (note 1), 5.

⁸⁴ It remains to be noted that a mandatory obligation for pension funds to vote could result in the pension funds calling increasingly on the service of proxy advisors, for reasons of cost and to avoid the risk of criminal or civil liabilities. Such an approach involves the risk that the pension funds will more or less blindly follow the recommendations of the proxy advisors, and that the latter would therefore acquire new, unregulated powers. The issue of «separation of ownership from ownership» would be significantly exacerbated (see supra chap. III.1).

⁸⁵ GLII (note 1), 6.

⁸⁶ GLII (note 1), 6.

⁸⁷ See supra chap. III.1.

role. A milestone was reached with the publication of the UK Stewardship Code in 2010. When similar guidelines for institutional investors are adopted in Switzerland in 2013, this country joins the forefront of developments on this issue.

In undertaking an assessment of the Guidelines, in our view there are some essential points that carry at least as much weight as the substance of the rules themselves. The first of these points to mention is the fact that with these Guidelines, Switzerland even has a code for institutional investors⁸⁸. Next, the sponsoring organisations are important. In this regard it is worth noting that the publishers include not only organisations that represent companies (economiesuisse and Swiss Holdings), but also organisations that represent the investor side of the equation (the Association of Swiss Pension Fund Providers ASIP, the Swiss Federal Social Security Funds OAI/II/IC, Ethos, as well as the Swiss Bankers Association, which plays a certain intermediate role). The Swiss Fund Association is essentially the only relevant organisation that is missing, and this is an unfortunate situation that will hopefully be corrected at some time in the future. The third thing that is worth noting is that the Guidelines follow the principle of «comply or explain», which, although in accordance with the international standard of today, goes further than its sister code, the Swiss Code of Best Practice⁸⁹. While the latter is undergoing revision at the present time⁹⁰, this principle is not laid down in the currently valid version, published in 2002 (Code) and in 2007 (Appendix), respectively⁹¹.

Based on importance, the next priority for the Guidelines is that life is breathed into them quickly and that they develop from an abstract set of rules into one that is relevant in practice. This requires that as many investors as possible ascribe to the Guidelines as fast as possible. As the procedure for this is not laid down in the Guidelines, there is a requirement that the publishers immediately provide a point of contact with an address and website for all questions in connection with the Guidelines.

Ultimately, the question that will be crucial to the relevance of the Guidelines is whether it will succeed in persuading the numerous foreign investors who hold shares in Swiss companies to either ascribe to these Guidelines, or – which seems to be more realistic – to follow a similar foreign code. In the latter case, the aim should be that

these investors declare explicitly that they are also prepared to follow the principles contained in these codes when it comes to Swiss companies. A procedure and a point of contact are also needed quickly for managing such declarations.

In terms of content, we have evaluated some aspects of the Guidelines in the chapters above⁹². At the present time, we consciously wish to avoid making a more detailed and comprehensive evaluation for the reasons mentioned above. Substantive evaluation of the Guidelines is probably a very individual thing, and depends partly on whether the observer prefers to see the glass as half full or half empty. For us, the crucial thing is that the Guidelines have given us a starting point from which the debate over the content it offers can develop in academia and business circles. We consider it important that this debate continues, that the Guidelines are regularly analysed for their effectiveness and that they are continually developed and updated. On the subject of further development and updating, we consider it imperative that the Guidelines also hold their ground with international benchmarks in the future. For Switzerland as a small open economy with a large number of foreign investors, it will be essential to achieving wide acceptance and therefore success that these Guidelines are harmonised as far as possible with the Best Practice Codes of our important partner nations (USA, UK, Germany, France). It is only when the foreign long-term investors ascribe to these or to similar Guidelines that corporate governance in multinational Swiss companies will make further progress in this area.

3.2. Recommendation: establishment of a «Swiss Corporate Governance Foundation»

Soft law is a powerful tool for the continuous improvement of the corporate governance of companies. Self-regulation has a higher purpose than rules set by the state: striving for the best possible behaviour rather than merely fulfilling minimum legal standards⁹³. Best Practice Codes align themselves with international developments and benchmarks; they can be adapted more quickly than laws to suit new situations and issues. They also have the great advantage that they can be individually tailored to fit the concrete circumstances of the individual company, while laws operate on the principle of «one size for all». In this context, the following sentence from the German Corporate Governance Code is noteworthy, and interestingly it was first incorporated in the context of a revision made in 2012: «A well justified deviation

⁸⁸ See in this context BÜHLER (note 3), 487, who has proposed the inclusion of principles concerning the exercising of voting rights by institutional investors in a revised edition of the SCBP, and HAUSMANN/BECHTOLD-ORTH (note 12), 365.

⁸⁹ See supra chap. IV.2.

⁹⁰ See FRICK (note 29), 233 et seq.

⁹¹ See SCBP (note 31), especially the comments on the Appendix 1, 27; see also BÜHLER (note 3), 484 et seq., who, in regard to the updating of the SCBP, postulates an obligation by public companies to publicly acknowledge the SCBP or one of the other recognised international codes.

⁹² See supra chap. IV.3 and V.1.

⁹³ See ANDREAS BINDER/ROLF DUBS/MARTIN HILB/GABRIELA MANSER/ROLAND MÜLLER/NINA SPIELMANN, Best Practice in SME, Recommendations for the Direction and Control of Small and Medium-sized Enterprises, St.Gallen 2009, 1.

from a Code recommendation may be in the interest of good corporate governance»⁹⁴.

However, suitable sponsors and structures are needed for such positive effects to evolve from corporate governance codes. What is needed are sponsors who monitor continuously, both nationally and internationally, who tackle new problems and issues and address them in a timely manner in new editions of the Code⁹⁵. In order for this to take place effectively and efficiently, such sponsorship must be widely supported and enjoy a high level of acceptance among all stakeholders. Commendable examples in this regard are found in the UK, Germany and the Netherlands. In the UK, the Corporate Governance Code is reviewed and updated every two to three years; the second edition of the UK Stewardship Code that was first published in 2010 is already available. The sponsor of the Code is the Financial Reporting Council, an independent self-governing organisation for the promotion of good corporate governance and high quality reporting, which is also entrusted with certain regulatory responsibilities and plays a monitoring role. In Germany, the Corporate Governance Code is reviewed as often as every year in the context of national and international developments, and adapted as necessary⁹⁶. There, the sponsor is a body that is employed by the authorities, the Government Commission German Corporate Governance Code. Finally, in the Netherlands, the widely supported Corporate Governance Code Monitoring Committee has been responsible for the Dutch Corporate Governance Code since 2008.

Since soft law on corporate governance in Switzerland has been in existence for 11 years, it seems to us that the time has arrived to provide also the Swiss Best Practice Codes with a more widely supported and accepted sponsorship. Specifically, we propose the creation of a «Swiss Corporate Governance Foundation», that will be established and supported by representatives and organisations from business (companies, investors and clients) and academia (jurisprudents and economists) and which will be entrusted with the task of overseeing the Swiss Corporate Governance Codes (Swiss Code of Best Practice and Guidelines for institutional investors) and with their further development.

⁹⁴ GCGC (note 31), 2.

⁹⁵ Regarding the necessary continuous updating of corporate governance codes see also BÜHLER (note 3), 488.

⁹⁶ GCGC (note 31), 2.