AIDA Questionnaire on the Corporate Governance of Insurers World Congress, Rio, 2018

Report for Switzerland

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I General

1 Question 1

1.1 Question

In your jurisdiction, what corporate governance models are available to insurance companies? In case multiple models are available, describe the main differences and the allocation of management and monitoring powers among the relevant bodies/committees and which model is generally or ideally adopted by insurance companies.

1.2 Response

Under Swiss insurance supervisory law an insurance company may be established in the legal form of (i) a corporation (*i.e.* company limited by shares; art. 620 et seq. of the Swiss Federal Code of Obligations ("**CO**")) or (ii) a cooperative (art. 828 et seq. CO)(art. 7 of the Swiss Federal Insurance Supervision Act ("**ISA**")). While a corporation is capital-related, a cooperative is conceptually or typically person-related and for the benefit of those individuals using its services although in some larger undertakings these characteristics might have remained rudimentary only.

In Switzerland, most insurance companies are established in the form of a corporation. Consequently, we direct the focus of the present report to the legal form of a corporation.

Under general principles of Swiss corporate law, corporations may adopt either a one-tier board model structure or a two-tier structure where the board of directors delegates the daily operational business to the management board. Swiss insurance supervisory law, however, requires insurance companies to implement and strictly separate the governance bodies of a) a board of directors for strategic decisions, oversight and control and b) an executive management board for operational tasks (art. 13 para. 1 of the Swiss Federal Insurance Supervision Ordinance ("**ISO**")). Consequently, insurance companies must implement a two-tier structure.

Under Swiss insurance supervisory law, an insurance company must implement corporate governance principles throughout its organisation including in particular (see FINMA Circular 2017/2 Corporate Governance Insurers, margin no. 6 et seq. ("**Circular 2017/2**")):

– clear allocation and documentation of duties, powers, responsibilities and reporting channels

– clear separation between operational activities and control activities by means of appropriate measures

– establishment of internal reporting processes to share information with all relevant units and individuals in the company

– documentation of key decisions (and associated measures)

– establishment of an audit and a risk committee for insurance companies of supervisory categories 2 and 3 of whose members at least one third must be strictly independent

– establishment of effective company-wide risk management and an effective internal control system ("**ICS**") including the control functions (risk management, compliance, internal audit), and periodic reviews of their appropriateness by an independent (internal or external) party

– definition of principles, processes and structures for (a) compliance with legal, regulatory and internal requirements, (b) identifying and dealing with abuses and conflicts of interest, (c) the conduct expected of employees

– establishment of processes to ensure that individuals responsible for overall direction, supervision and control as well as the executive management of the insurance company have and maintain the required professional experience, specialist knowledge and personal aptitude

– at least one third of the board members of an insurance company must be independent (Circular 2017/2, margin no. 18). However, the Swiss Financial Market Supervisory Authority FINMA ("**FINMA**") may approve exemptions from such independence requirement (Circular 2017/2, margin no. 18). Board members are deemed to be independent if they (Circular 2017/2, margin no. 19 et seq.):

  (i) are not and have not in the previous two years been employed in some other function within the insurance company

  (ii) have not been employed in the previous two years by the insurance company's audit firm as lead auditor of the regulatory audit responsible for the insurance company;

(iii) have no commercial links with the insurance company which, in view of their nature and scope, would lead to conflicts of interest; and

(iv) are not a shareholder of the insurance company in the sense of art. 4 para. 2 lit. f ISA and do not represent any shareholder in the sense of art. 4 para. 2 lit. f ISA (i.e. a person who holds directly or indirectly 10 percent of the capital or the voting rights of the insurance company or which can significantly influence its business activity in any other way).

Executives (*e.g.* executive directors or members of the management board) of a holding or an affiliated company within an insurance group or conglomerate are, in principle, not deemed to be independent (FINMA Explanatory Report to Circular 2017/2 dated 31 May 2016, p. 14 ("**Explanatory Report to Circular 2017/2**"); available under www.finma.ch/en/documentation/consultations/completed-consultations/2016).

In addition, specific requirements, *e.g.* regarding size, composition and independence of the board of directors apply (see responses I7.2 and II1.2).

Insurance groups and conglomerates are subject to consolidated supervision (art. 65 and 73 ISA). Swiss laws and regulations relating to corporate governance, in principle, also apply to insurance groups and conglomerates (*e.g.* Circular 2017/2, margin no. 2). Their organisational structure must be appropriate for the group's business activity and risks (art. 191 para. 1 ISO). In addition, insurance groups and conglomerates have to implement risk management and internal control functions on a group-wide basis (art. 195 para. 2 and 204 ISO).

Swiss insurance supervisory law also provides for minimum standards for remuneration schemes, which must be implemented by the two biggest Swiss insurance groups and serve as best practice guidelines for all other licensed insurance companies (*cf.* FINMA Circular 2010/1 Minimum Standards for Remuneration Schemes for Financial Institutions ("**Circular 2010/1**"), margin no. 6 et seqq). *Inter alia*, these minimum standards include (i) a simple, transparent and enforceable remuneration scheme, (ii) an independent control function in relation to designing and applying the remuneration scheme, (iii) an alignment of the structure and level of total remuneration with the firm’s risk policies and designed so as to enhance risk awareness as well as (iv) a variable remuneration which is funded through the long-term economic performance of the company and granted according to sustainable criteria. Insurance companies which are not required to implement Circular 2010/1 are recommended to take its principles as best practice guidelines into account for their remuneration schemes. In justified cases, however, FINMA may require a firm which is not required to implement Circular 2010/1 nevertheless to implement some or all of its provisions. This may be appropriate, for example, in light of the firm’s risk profile, its business activities or its business relationships, or where its remuneration scheme entails inappropriate risks. Thus, FINMA in principle deliberately leaves wide leeway for the implementation of company specific remuneration rules, but has the possibility to intervene if required.

Insurance companies listed on a Swiss stock exchange are also subject to further laws and regulations on remuneration that apply to listed companies, in particular, the Ordinance against Excessive Compensation in Listed Companies ("**OaEC**"): The board of directors of a listed company *e.g.* must establish a compensation committee (art. 7 OaEC) and disclose an annual compensation report on the remuneration granted to members of the board of directors and management board (art. 13 OaEC). Although the compensation report is not subject to approval requirement by the shareholders' general meeting under the OaEC, it is considered best practice to submit the compensation report to a separate non-binding advisory vote of the shareholders (see also recommendations in the Swiss Code of Best Practice for Corporate Governance, item 38). Furthermore, the applicable listing rules may provide further specific requirements, in particular, relating to disclosure (see response V3.2).

Swiss corporate law is currently undergoing a major revision. The revision pursues, *inter alia,* improving corporate governance, in particular, shareholder protection, gender equality and control mechanisms. This may have further impact on insurance companies in the legal form of a corporation in future. It is, however, unlikely that the new provisions will be enacted and enter into force before 2020 or 2021.

2 Question 2

2.1 Question

What are the main sources of regulation addressing corporate governance of companies (and in particular of insurance companies)? *e.g.*, statutes, regulations, other rules/recommendations issued by national and supranational supervisors/regulators, self-regulation, codes of best practice, codes of ethics.

2.2 Response

For insurance companies the main sources of laws and regulations addressing corporate governance are:

- The corporate law, including, in particular, the corporate law provisions on corporations (art. 620 et seq. CO) and cooperatives (art. 828 et seq. CO), respectively.

- Specific Swiss insurance supervisory laws and regulations, including, in particular, the ISA, ISO, FINMA Circulars and further FINMA guidelines and notices detailing how FINMA applies financial market legislation in its supervisory practice): ISA *e.g.* addresses the regulatory license requirements pertaining to (i) the good reputation and guarantee of proper business conduct, *inter alia,* of board and management members (art. 14, 67 and 75 ISA), (ii) risk management (art. 22 ISA) and (iii) ICS including the appointment of an independent internal auditor (art. 27 ISA). The implementing ISO, in particular, specifies the requirements pertaining to the proper business conduct requirement (art. 12 to 14 ISO) and risk management (art. 96 to 98a, 195, 196 and 204 ISO). Furthermore, FINMA issues circulars, guidelines and notices (see art. 7 of the Swiss Federal Financial Market Supervisory Act ("**FINMASA**")). In particular, the following FINMA circulars address corporate governance of an insurance company: Circular 2017/2, 2016/04 Insurance Groups and Conglomerates, 2016/3 ORSA Insurers, 2016/2 Public Disclosure Insurers ("**Circular 2016/2**") and Circular 2010/1.

- Listed insurance companies are, in addition, subject to the OaEC and the applicable listing rules of the SIX Swiss Stock Exchange ("**SIX**")(*e.g*. SIX Directive on Information relating to Corporate Governance ("**DCG**")). Furthermore, there are two non-binding recommendations relating to corporate governance of listed companies, both issued by non-governmental organisations: The Swiss Code of Best Practice for Corporate Governance ("**SCBP**") and the Guidelines for Institutional Investors governing the Exercise of Shareholder Rights in Swiss Listed Companies.

Supranational rules, regulations and recommendations issued by international standard setting organisations (*e.g.* International Association of Insurance Supervisors ("**IAIS**"), Joint Forum) typically are not directly applicable in Switzerland. However, they have an important impact on the development of Swiss insurance laws and regulations (*cf.* art. 7 para. 2 lit. d FINMASA)(*e.g.* the IAIS Insurance Core Principles ("**ICP**") that, *inter alia,* refer to corporate governance (*e.g.* ICP 7)). In addition, supranational rules, regulations and recommendations may affect the corporate governance structure of international insurance groups and conglomerates in the context of supervisory colleges (*e.g.* IAIS Issues Paper on Approaches to Group Corporate Governance and Joint Forum Principles for the Supervision of Financial Conglomerates). To this extent they indirectly or ultimately are as well an important source of law for insurance companies.

3 Question 3

3.1 Question

In your jurisdiction, are you aware of any insolvency or distress of an insurer directly attributable to poor corporate governance standards or practices or failure to adequately implement and apply such principles? If so, please identify the main triggers of the insolvency.

3.2 Response

In principle, Swiss insurance companies are well capitalized despite the current low or negative interest rate environment (FINMA's Annual Report 2017, p. 55; available under https://www.finma.ch/en/documentation/finma-publications/annual-reports--and-financial-statements/). There have been only few cases of insolvencies of insurance companies in Switzerland. One case being the insolvency of Supra Assurances SA in 2012 that was, *inter alia,* related to shortcomings in corporate governance practices:

FINMA concluded that Supra Assurances SA, a supplementary health insurance company licensed by FINMA, was over-indebted. FINMA found evidence of serious shortcomings with respect to supervisory law in corporate governance, risk management, compliance and controlling within Supra Assurances SA and the entire group. In particular, the insurance company did not appropriately reflect the required provisions for future benefit liabilities. As a result, FINMA ordered the forced liquidation of Supra Assurance SA and the transfer of its portfolio of policyholders to another affiliated insurance company licensed by FINMA (for further information please see: www.finma.ch/en/news/2012/11/mm-supra-20121114).

As a side note, corporate governance shortcomings have been reprimanded by FINMA also in other cases (absent from liquidation or distress):

Regarding the case Group Mutuel, FINMA considered upon its investigation in 2015 that Group Mutuel had severely breached, *inter alia*, business conduct and corporate governance requirements at the level of individual group companies active in the supplementary health insurance business as well as within the group. Significant shortcomings in the area of corporate governance were detected in areas such as segregation of duties, effectiveness of risk management and control functions as well as appropriateness of the compensation system, resulting in a FINMA order to Group Mutuel to make changes in the composition of the board of directors and an 18 months acquisition ban on the group (for further information please see: https://www.finma.ch/en/news/2015/07/mm-groupe-mutuel-2015-07-02/).

In the case KPT Versicherungen AG, several members of the board of directors received substantial payments under mandate agreements in addition to the agreed fixed remuneration and bonuses, although no additional services were rendered that were not already covered by the fixed remuneration. FINMA concluded that KPT Versicherungen AG paid inadequately with regard to the rules on handling conflicts of interest. Based on these breaches of duty, FINMA has banned two former members of the board of directors of KPT Versicherungen AG from exercising a senior management function within the financial sector for four years and has ordered the disgorgement of their unjustified payments (for further information please see: www.finma.ch/en/news/2012/01/mm-kpt-20120111).

4 Question 4

4.1 Question

In your jurisdiction, is corporate governance regulation applied according to the nature, scale and complexity of an insurer's business? If yes, please describe any significant differences and rationale for the differences.

4.2 Response

In principle, FINMA takes a principle-based approach and applies its regulation with due consideration of the principle of proportionality (*cf.* Annual Report of FINMA 2017, p. 12): *E.g.* FINMA's Circular 2017/2 specifically provides for a principle-based, proportionate approach in accordance with the specificities, size and complexity of the individual insurance company (Circular 2017/2, margin no. 5). Furthermore, FINMA has implemented a risk-based supervisory approach. As a result, FINMA assigns supervised insurance companies to one of five risk categories, in particular, based on the potential risks for creditors, investors, insured persons, the system as a whole and the reputation of the Swiss financial centre. An insurance company's risk potential determines which supervisory tools are used and the level of supervisory intensity (*e.g.,* increased risks require more intensive supervision). Accordingly, more stringent requirements apply in certain areas for insurance companies in the supervisory categories 1-3, whereas insurance companies in the supervisory categories 4 and 5 "'only' have to fulfil the baseline requirements. For example, FINMA requires insurance companies in supervisory categories 2 and 3 to establish a separate audit committee and a risk committee, whereas a combined risk and audit committee can be formed by insurance companies in supervisory category 3 and no such requirement exists for insurance companies in the supervisory categories 4 and 5 (Circular 2017/2, margin no. 25).

By following a principle-based, risk-oriented approach to supervision, FINMA aims to ensure an appropriate level of supervision with regard to the individual insurance company allowing FINMA to consider on a case-by-case basis the characteristics of each insurance company in terms of size, complexity, structure and risk profile (for further information please see: https://www.finma.ch/en/supervision/insurers/categorisation).

5 Question 5

5.1 Question

Please provide specific examples of corporate governance structures and practices that are better implemented through self-regulation rather than through legal or supervisory requirements.

5.2 Response

Self-regulation for anti-money laundering ("**AML**") purposes has proven an efficient way to combat money laundering in and from Switzerland. In connection with life insurances, it is argued that life insurance companies, in principle, have simple AML challenges given that they offer less products and have less distribution channels available than *e.g.* banks. However, life insurance products do not pose a homogeneous money laundering risk and, thus, need to be classified based on their individual features. While life insurance products that purely offer protection (*e.g.* proceeds only payable in case of death, disability or serious illness) pose low money laundering risk, this might not be true for life insurance products that *e.g.* offer early payment of cash surrender value and the possibility to nominate beneficiaries at an early stage such as *e.g*. Private Placement Life Insurance (PPLI) products. Against this background, self-regulation would offer the advantage of a balanced and dynamic framework adapted to the risk potential of a specific life insurance product and to changes in the life insurance market structure, where necessary.

Another example is the self-regulation on Business Continuity Management ("**BCM**") for insurance companies in Switzerland for which the Swiss Insurance Association (ASA) issued certain minimum standards and recommendations. The BCM aims at ensuring the survival, maintenance and continuation of business activities in extraordinary events and situations, such as technical or human failure, cyber-attacks, natural disasters or terrorism. FINMA recognised the BCM as a minimum standard and insurance companies may, therefore, fulfill business continuity management requirements by adopting the BCM. Since business continuity management is a rather complex and technical matter, self-regulation is, in our view, the appropriate way of regulation.

In addition, santésuisse, being the leading industry organisation of Swiss health insurance companies in the area of social health insurance, introduced certain limitations on the payment of brokerage fees from health insurance companies to insurance brokers on a self-regulatory basis which will, amongst others, be implemented by the seven biggest health insurance companies in Switzerland until 2019.

Self-regulation is a cornerstone of Switzerland’s financial market architecture. The FINMASA, for example, expressly addresses the issue of self-regulation and requires FINMA to support and recognize self-regulation (art. 7 para. 3 FINMASA). In particular, in very technical and fast developing areas of business features, self-regulation has proven to be a flexible and more efficient way of regulation than governmental regulation.

6 Question 6

6.1 Question

In case your jurisdiction was recently requested to implement domestically certain corporate governance principles set forth by supranational regulations, describe the main obstacles and problems (if any) that resulted from such process.

6.2 Response

As stated above (see response I2.2), international standard setting organisations have an important influence on the development of Swiss insurance laws and regulations. Similarly, legal developments in the EU often have a significant impact on Swiss insurance laws and regulations. In particular, Solvency II and the aim to obtain acknowledgement of equivalence of the Swiss regulatory regime with EU's Solvency II regime are important for Switzerland to ensure access of Swiss insurance companies to the EU market.

Switzerland has implemented solvency requirements for the assessment of capital strength of insurance companies (Swiss Solvency Test ("**SST**")) that have been acknowledged by the EU as being of an equivalent standard as Solvency II (see https://www.finma.ch/en/supervision/insurers/cross-sectoral-tools/swiss-solvency-test-sst/). In particular, the SST addresses the quantitative standards of Solvency II, but also considers certain particularities of the Swiss insurance market. Because of the differences in the legal systems of various EU countries, comparing Solvency II implementation at the national level is limited. Furthermore, insurance modelling is complex and there are options and methods for limiting comparability. On the other hand, overly simplified models harbour the danger of not adequately capturing the risks. Striking the right balance between the necessary complexity and the permissible simplicity in a model remains a major challenge.

In addition to the quantitative assessment under SST, FINMA has addressed both quantitative and qualitative elements of risk assessment under ORSA (referring to "Own Risk and Solvency Assessment"). ORSA was established mainly against the background of the relevant legal development in the EU under Solvency II and on ICP 16 issued by IAIS.

Furthermore, FINMA has addressed qualitative elements under its Swiss Quality Assessment ("**SQA**"), the qualitative counterpart to the SST. SQA audits corporate governance, the ICS and risk management of insurance companies.

7 Question 7

7.1 Question

Are there any significant differences between general corporate governance rules and the specific rules governing insurance companies?

7.2 Response

The general corporate governance rules in Switzerland as outlined, in particular, in the CO set the starting point for corporate governance regulation for insurance companies. In addition, Swiss supervisory insurance law on corporate governance provide for further and more detailed rules, see the examples below:

	General Corporate Governance Rules	*Specific insurance corporate governance rules*
Corporate governance principles		An insurance company must implement specific corporate governance principles throughout its organisation (see response I1.2).
Separation of operational and controlling activities	No strict separation between board of directors and management required by law.	Strict separation of operational activities and controlling activities (art. 13 para. 1 ISO; Circular 2017/2, margin no. 8).
Size of the board of directors	At least one board member for corporations (art. 707 para. 1 CO) and three board members for cooperatives (art. 894 para. 1 CO). (The SCBP recommends that the size of a board should match the needs of the individual company.)	At least three board members (the actual number depends on the company's size, complexity and risk profile)(Circular 2017/2, margin no. 17).
Composition of the board of directors	While a majority of a board of cooperatives must be cooperative members (art. 894 para. 1 CO), potential board members of corporations do not have to meet any formal prerequisites. (The SCBP recommends that a	Potential board members must meet certain conditions, in particular, regarding reputation, guarantee of proper business conduct (art. 14, 67 and 75 ISA), time, knowledge and experience (art. 12 para. 1 ISO; Circular

	board be composed by members of both genders.)	2017/2, margin no. 16)(see response II1.2).
Independence of board members	Corporate law does not address independence. (The SCBP recommends that a majority of the board members are independent.)	At least one third of the board members, in principle, must be strictly independent (as defined in Circular 2017/2, margin no. 18 et seq.)(see response II1.2).
Establishment of board committees	There are no mandatory committees for non-listed companies. Listed companies must establish a compensation committee (art. 7 OaEC). (The SCBP recommends that board committees, in particular an audit and a nomination committee, are established.)	Board committees must be established where appropriate. In particular insurance companies in supervisory categories 2 and 3, in principle, must establish an audit committee and a risk committee; of which at least one third of the members must be independent (Circular 2017/2, margin no. 25 and 26).
Establishment of ICS and control functions	Effective and efficient risk management, ICS and compliance are required by corporate law (art. 716a CO).	Insurance supervisory law requires insurance companies to establish an ICS, risk management system and compliance process (art. 22 and 27 ISA). Furthermore, the Circular 2017/2 sets forth detailed and strict requirements pertaining to control functions (risk management, compliance and internal audit).
Compensation principles	There are no principles provided by corporate law. Listed companies have to issue a compensation report on its remuneration scheme indicating the total amount of compensation and other compensation details for each member of the board of directors and the management board (art. 13 et seq. OaEC). (In addition, the SCBP recommends, inter alia, that (i) the members of the compensation committee shall be independent and (ii)	For a brief description of the minimum standards for remuneration schemes applicable for insurance companies, see response I1.2.

	the variable compensation element should be in reasonable proportion to the total compensation.)	
Assessment of corporate governance structure and practices		In principle, Swiss insurance laws and regulations are subject to FINMA supervision and assessed through FINMA's supervisory tools including SST, ORSA and SQA.

II Fitness and Propriety of Board Directors

1 Question 1

1.1 Question

Are there any laws or regulations already adopted or any proposals in your jurisdiction, relating to the qualification and composition of board directors in an insurance company? If so, please explain.

1.2 Response

A board of directors of an insurance company must have at least three members. The actual number depends on the company's size, complexity and risk profile (Circular 2017/2, margin no. 17). The board of directors must be composed in such a way that it is able to properly oversee and direct the insurance company. In particular, the board collectively must have sufficient insurance knowledge (art. 12 para. 1 ISO), the requisite experience and knowledge of business management, strategic management, risk control, and finance and accounting (Circular 2017/2, margin no. 16).

All board of directors must have a good reputation and ensure fit and proper business conduct (art. 14, 67 and 75 ISA). This requirement (as, in principle, all license requirements) needs to be fulfilled at the time of the granting of the license and during the entire term of the license. FINMA has broadly interpreted the term "fit and proper business conduct". Fit and proper conduct, in particular, requires compliance with the laws and regulations, i.e. of statutes and ordinances, regulations and precedents of the supervisory authority, of self-regulation and other guidelines. When deciding on the capacity to ensure fit and proper business conduct, FINMA considers both the professional qualifications and the general reputation of the board of directors. The board of directors have to fulfil the proper business conduct requirement at the time of the establishment of an insurance company and on an ongoing basis throughout the entire duration of the license. In addition, board of directors must be able to dedicate sufficient time and the necessary expertise in order to fulfil their mandate (art. 12 para. 2 ISO).

For more detailed information on the qualification and composition requirements of the board of directors in an insurance company, see also response I1.2.

2 Question 2

2.1 Question

> In your opinion, what factors, conditions, or incentives might weaken the independence of the board of directors or individual members of the board?

2.2 Response

In our view, the independence of a board of directors may be weakened if potential board members *e.g.* (i) are engaged in another function within the insurance company *e.g.* under an expert mandate agreement or as executive directors or managers by another company of the same group of companies or (ii) were previously engaged in another function within the insurance company or with the company's audit firm. Potential mitigation measures are, in particular, the implementation of internal and/or regulatory minimal requirements pertaining to the independence of board members (*e.g.* as set forth in Circular 2017/2) and internal guidelines regarding the resolution of conflicts of interest (*e.g.* establishment of an independent board committee for conflicted matters).

In addition, remuneration may potentially create incentives for board members to take inappropriate risks, infringe applicable law or regulations, internal rules or violate agreements. In this context, remuneration schemes at financial institutions should motivate employees to contribute to the long-term success and stability of the company. Therefore, compensation structure needs to be designed in a way to limit or mitigate potential conflicts of interest and other negative incentives, *cf.* Circular 2010/1.

3 Question 3

3.1 Question

> How does an insurance company ensure that individual board members and the board collectively have enough knowledge to monitor and oversee the activities of the insurer appropriately, particularly where specific expertise is needed?

3.2 Response

In particular the following factors are important for ensuring the board's knowledge and expertise: proper selection, suitable mix and continuing education of the board members.

It is important that board members complement one another with regard to their knowledge and experience, so that they collectively meet all the requirement specifications set forth for the board as a whole. Therefore, the requirement specifications have to take into account the required knowledge and experience for the vacant position in consideration of the knowledge and experience of the retained board members. Although not legally required (but considered best practice under the SCBP), most insurance companies have a nomination committee assisting the board of directors in fulfilling its responsibilities and to discharge the board of directors' responsibility to (i) establish and maintain a process relating to nomination of the members of the board and the group executive management as well as (ii) identify individuals who are qualified to become members of the board and the group executive management when vacancies arise.

Furthermore, the board should issue a charter that requires each board member to continuously train and educate themselves (*e.g.* as a performance indicator for remuneration purposes), as further outlined in Circular 2017/2. Such further education programs may be offered either internally or externally.

From a regulatory perspective, a change of the composition of the persons in charge of the direction, management, supervision and control of an insurance company constitutes a change of its regulatory business plan. This change must be filed with FINMA for approval (with indication of such person's good reputation and guarantee for a fit and proper conduct of business as well as curriculum vitae ("**CV**")) within 14 days after the implementation. It is deemed approved if FINMA does not initiate an enquiry within four weeks upon the notification (art. 5 para. 2 ISA).

4 Question 4

4.1 Question

> Are there significant differences in terms of requirements and duties between executive and non-executive members of the board of directors of an insurer?

4.2 Response

Under Swiss insurance laws and regulations insurance companies, in principle, must strictly separate strategic and controlling functions of the board of directors from the operational function of the executive management board (*cf.* art. 13 para.

1 ISO and see above response I1.2). Consequently, a director of an insurance company, in principle, must be non-executive.

As a general remark, at least one third of the members of the board of directors have to fulfil certain independence criteria. These independence criteria include that the members *e.g.* are not and have not in the previous two years been employed (i) in some other function within the insurance company or (ii) by the insurance company's audit firm as a lead auditor of the regulatory audit responsible for the insurance company and (iii) are not shareholder of the insurance company and do not represent any shareholder (*cf.* Circular 2017/2, margin no. 18 et seqq.).

5 Question 5

5.1 Question

> In your jurisdiction are there any black letter rules or general principles that enable directors to rely upon external opinions when addressing issues or aspects where specific expertise in needed?

5.2 Response

Under the general principles of corporate law, a business decision of a board of directors, including the reliance upon external opinions, may benefit from standards that are similar to the business judgement rule. Under such principles, a court, in principle, reviews business decisions of a board of directors restrainedly if they have been taken in good faith, result from a proper decision-making process based on appropriate information and free of conflicts of interest, unless they are clearly unreasonable in the light of the circumstances at the time of the decision-making (decision of the Swiss Federal Supreme Court 4A_74/2012 dated 18 June 2012, consid. 5).

6 Question 6

6.1 Question

> Describe the extent and scope of supervisors'/regulators' intervention with reference to the qualifications and to the activities of the board of an insurer.

6.2 Response

Members of the board of directors of an insurance company must have a good reputation and ensure proper business conduct (art. 14 para. 1 lit. a, 67 and 75 ISA). The proper business conduct requirement is an ongoing license requirement for insurance companies, see response II1.2.

A licensed insurance company has to notify FINMA of changes to the board of directors (art. 5 para. 2 ISA); in particular, it has to submit CVs of new board members to FINMA within 14 days of their election (art. 12 para. 3 ISO). The change to the board of directors is deemed to have been approved if FINMA does not institute an examination within 4 weeks of the notification (art. 5 para. 2 ISA). However, for practical reasons it is usually sensible to notify FINMA in advance and to obtain at least FINMA's informal approval prior to any changes.

If FINMA becomes aware of indications that one or several board members of an insurance company do not meet the proper business conduct requirement (*e.g.* if they have breached supervisory law), it may instigates enforcement proceedings against the insurance company and the particular board members. If the proper business conduct requirement was violated, FINMA has a broad range of enforcement tools at hand. Enforcement tools include, but are not limited to, orders regarding the restoration of compliance with the law (art. 31 FINMASA), declaratory rulings (art. 32 FINMASA), industry bans (art. 33 FINMASA), publications of rulings (art. 34 FINMASA), confiscation (art. 35 FINMASA), and, as *ultima ratio*, withdrawal of licenses (art. 37 FINMASA). Other key measures or tools against individuals are: the watch list (*i.e.* a database containing information that is relevant in assessing compliance with the proper business conduct requirement) and a so called "business conduct letter" (*Gewährsbrief)(i.e.* informal reservation to assess compliance with the proper business conduct requirement if the person in question intends to assume a specific position that is subject to the fit and proper conduct of business requirement).

FINMA *e.g.* decided in a case in 2012 that an insurance company seriously breached its duty regarding the handling of conflicts of interest, in particular, in the context of the price setting for shares that were to be bought back as part of a planned merger in 2010 and payments to directors under mandate agreements. FINMA's sanction included a four-year-ban on two former members of the board of directors from exercising a senior management function within the financial sector, see https://www.finma.ch/en/news/2012/01/mm-kpt-20120111/.

7 Question 7

7.1 Question

Are there any special rules and regimes applicable to the governance of subsidiaries belonging to an insurance group, also in terms of information flows?

7.2 Response

Insurance groups and conglomerates are subject to consolidated supervision (see response I1.2). In this context, insurance groups and conglomerates must meet the proper business conduct requirement (art. 14, 67 and 75 ISA) on a consolidated basis. For this purpose, all subsidiaries, regardless of their license status, are included in order to prevent circumventions of the proper business conduct requirement through unregulated entities.

In principle, an insurance undertaking may only carry out a business activity other than pure insurance activities if such other business has a direct nexus to the insurance activity (art. 11 para. 1 ISA). FINMA may authorise the operation of other business if this does not jeopardize the interests of the insured persons (art. 11 para. 2 ISA). Furthermore, an insurance company may organise its other business activities also by establishing a subsidiary and performing such activities out of this subsidiary.

If the subsidiary is an insurance company, its board of directors, in principle, must meet the fitness and propriety requirements as outlined above (see response II1.2).

Insurance groups and conglomerates must *e.g.* have an organisational structure appropriate to the group's business activity and risks (art. 191 para. 1 ISO). They provide risk management and internal control functions on a group-wide basis (art. 195 para. 2 ISO). Furthermore, insurance groups and conglomerates must submit a description of the organisation, control and management structure (art. 191 para. 2 ISO), a chart of the group structure (art. 192 para. 1 ISO) and a documentation of their risk management (*cf.* art. 22 ISA in conjunction with art. 97 ISO) to FINMA (art. 196 para. 1 ISO). Furthermore, material intragroup transactions must be reported to FINMA prior to their effectiveness (art. 194 para. 1 ISO).

As a matter of Swiss corporate law, information rights of shareholders are limited to information necessary for the exercise of his or her rights at the shareholders' meeting. This, in principle, also applies in an intra-group context. In this context, the duty of loyalty of the board members imposes a confidentiality obligation on each board member and any information sharing must be compatible with the interests of the company. Furthermore, the passing on of information must not infringe the principle of equal treatment of shareholders.Subject to the corporate law limitations set out above, information flows within an insurance group or conglomerate are, in principle, permissible, as long as they comply with Swiss laws and regulations on data protection and secrecy provisions, including the Swiss Federal Data Protection Act. In particular, information flows are restricted with regard to cross-border transmissions directly or indirectly (*i.e.* transmission to a subsidiary or branch domiciled outside of Switzerland for the purpose of subsequently forwarding the information; FINMA's circular 2017/6 Direct Transmission, margin no. 6 ("**Circular 2017/6**")) to foreign supervisory authorities. Insurance companies may only transmit non-public information to foreign financial market supervisory authorities or other entities responsible for them, subject to certain conditions, in particular, if the authority requesting the information is bound by official and professional secrecy provisions and the rights of clients and third parties are preserved (*e.g.* business and bank-client confidentiality and data protection; Circular 2017/6, margin no. 30)(art. 42c para. 1 in conjunction with art. 42 para. 2 FINMASA).

Furthermore, an insurance company may transmit non-public information related to the transactions of clients and supervised parties to foreign authorities and to entities acting on the authorities' behalf (*e.g.* to a transaction register or a foreign exchange's reporting office; Circular 2017/6, margin no. 32) if the rights of clients and third parties are preserved (art. 42c para. 2 FINMASA).

The transmission of information that is of substantial importance (*cf.* art. 29 para. 2 FINMASA) must be reported to FINMA prior to execution (art. 42c para. 3 FINMASA).

III Risk Management

1 Question 1

1.1 Question

In your opinion, what is the biggest risk challenge (e.g. regulation, capital standard, pricing, interest rate, cyber, terrorism, etc.) facing the insurance industry today in your jurisdiction?

1.2 Response

The continuing low interest rate environment is a major challenge for the insurance industry in Switzerland and, in particular, for the life insurance sector (*cf.* FINMA's Annual Report 2017, p. 61). However, FINMA considers that Swiss insurance companies currently handle those challenges remarkably well (*cf.* FINMA's Annual Report 2017, p. 53). Furthermore, for life insurance companies data protection poses an ongoing challenge. The increasing importance and amount of collected and analysed mass data intensifies the need for insurance companies to protect themselves and their client data from cyber risks.

For reinsurance companies, the market environment may continue to be difficult and the decline in premium income may persist, especially in the property business. The outlook therefore remains challenging due to the large available capacities in the industry (*cf.* FINMA's Annual Report 2017, p. 53).

Non-life insurance companies are challenged by saturated markets and stiff competition (*cf.* FINMA's Annual Report 2017, p. 53).

2 Question 2

2.1 Question

> What specific laws or regulations, actual or pending in your jurisdiction, will present significant implementation risk challenge toward the insurance industry?

2.2 Response

The Swiss insurance contract law is currently subject to a legislative revision aiming to increase the level of protection for insured persons. In addition, against the background of the entering into force of the new financial service act, i.e. the Swiss Federal Act on Financial Services ("**FinSA**"), the ISA will undergo a revision as well. For further information on the current revision of the ISA, see our response IV2.1 below. Both legislative projects may result in potential implementation risk challenges for insurance companies.

The Swiss federal council has proposed a preliminary draft revised Swiss Federal Act on Data Protection ("**PD-FDAP**") in order to adapt data protection to today's technological and social conditions. The PD-FDAP provides that data protection, in general, is strengthened, the transparency of the processing of data is increased and the control of affected persons over their own data is improved.

However, the PD-FDAP provides various burdensome new duties for data processing. *E.g.* under the PD-FDAP, insurance companies would be obliged to (i) inform the insured persons about the identity and details of all external agents involved in data processing and the categories of data processed by such external agents (art. 13 para. 4 PD-FDAP) as well as (ii) obtain consent for profiling and analysing personal data. The PD-FDAP further provides an extended range of sanctions for the violation of its provisions (art. 50 et seq. PD-FDAP). Therefore, under the PD-FDAP, insurance companies' compliance efforts would expand significantly with regard to the increased potential liability. Insurance companies, in particular, in life insurance business will face significant implementation risk challenges in order to adapt to the proposed new legislation on data protection.

IV Ethics and Corporate Social Responsibility

1 Question 1

1.1 Question

> Please provide any concrete examples where business ethical standards and/or corporate social responsibility standards have been applied and have changed the behaviors of the insurance company.

1.2 Response

As stated above (see response II6.2), the proper business conduct requirement is an ongoing license requirement for insurance companies. FINMA has made extensive use in interpreting the term "proper business conduct". Proper business conduct in particular requires the insurance company and its directors and managers to act in compliance with Swiss (and foreign) laws and regulations, internal guidelines, regulations issued by self-regulatory organisations and contractual obligations with policyholders and insured persons, see also response II1.2. Against this background, Swiss insurance laws and regulations provide for some guidance for business ethical standards.

Furthermore, some insurance companies have implemented investment principles that to some extent take into account considerations regarding ethical or social responsibility standards. *E.g.* Allianz Suisse Insurance Company Ltd has implemented investment principles that, *inter alia,* focus on sustainable usage of energy (www.allianz.ch/de/ueber-uns/engagement/investitionen-in-die-zukunft). Others assume corporate social responsibility by supporting environmental projects. *E.g*. Zurich Insurance Company Ltd supports a platform for sustainable issues relating to nature and living (www.zurich.ch/en/about-us/corporate-responsibility/umwelt-arena).

For insurance brokers, the code of conduct of the leading industry organisation SIBA (Swiss Insurance Brokers Association) provides for several business ethical standards that its members are supposed to comply with, including responsibility and fairness.

2 Question 2

2.1 Question

In your jurisdiction, are there any specific laws or regulations already adopted or any proposals, or any arrangements in place in the governance system, relating to the protection of policyholders' and/or financial consumers' interests?

2.2 Response

In principle, many provisions of Swiss insurance law and regulation serve the purpose to protect insured persons *e.g.* from insolvency risks of insurance companies or from misuse (art. 1 para. 2 ISA, art. 6 para. 1 ISA etc.).

In addition, it is FINMA's supervisory objective to protect creditors, investors and insured persons as well as ensuring the proper functioning of the financial market (art. 5 FINMASA). FINMA may only exercise its regulatory powers to the extent required by the supervisory objective (art. 7 para. 2 FINMASA).

Currently, the Swiss parliament contemplates to partially revise the ISA with regard to client protection based supervision and to establish restructuring rules for insurance undertakings. The revision of the ISA addresses as well insurance related topics that have previously been included in the draft new FinSA, which aims to increase investor protection and requires financial institutions to provide investors with general information about themselves and special information about their services provided. As insurance companies will not fall under the scope of the FinSA this will be addressed by the revision of the ISA to align the new requirements applicable for other financial institutions and such for insurance companies. The full extent and the precise timing of the envisioned revision has, however, not yet been publicly disclosed.

Therefore, Swiss regulatory law for insurance companies, including corporate governance requirements as outlined in this questionnaire, strives for more protection of policyholders and/or financial consumers.

3 Question 3

3.1 Question

In your jurisdiction, is an insurance company required to produce an annual Corporate Social Responsibility (CSR) report or a Global Sustainability Initiative (GSI) report? If so, what context needed to be disclosed in these reports?

3.2 Response

Under Swiss insurance regulations, insurance companies are not required to produce a CSR or GSI report.

Listed companies may optionally publish a sustainability report that, if they decide to do so, is subject to internationally recognised standards (art. 9 DCG). If a listed company decides to publish a sustainability report, such report must comply with one of the internationally recognised standards as determined by SIX Swiss Exchange (art. 9 para. 2 DCG). A list of companies that decided to publish such a sustainability report (i.e. provide for an opt-in) is publicly available on the homepage of SIX Swiss Exchange. CSR is a relatively new concept in Switzerland, even though some components of CSR already form part of Swiss law (*e.g.* laws on employment protection, gender equality and protection of the environment).

The current draft of the CO provides that listed companies (art. 727 para. 1 no. 2 draft CO) are required to disclose and explain gender benchmarks not complied with for the board of directors or the executive in its compensation report (*cf.* art. 734f draft CO; Dispatch 2016 CO, 421) (*comply-or-explain principle*). This benchmark proposal determines an objective according to which the under-represented gender should represent at least 30 percent of the board members and at least 20 percent of the executive directors. Companies in which these benchmarks are not met must explain the reasons why the benchmark is not being met and the measures taken or to be taken to promote the gender less strongly represented (*cf.* art. 734f no. 1 and 2 draft CO; Dispatch 2016 CO, 455 and 591 et seq.). To fill the positions in question, a comparison of the qualifications of the candidates has to be drawn up on the basis of clear, gender-neutral and unambiguous criteria. In the case of equal qualifications, preference is given to the under-represented gender (Dispatch 2016 CO, 452).

As regards the voluntary compliance with ethical or social responsibility standards by certain Swiss insurance companies, see responses IV1.2.

V Disclosure

1 Question 1

1.1 Question

In your opinion, what mechanisms shall be in place or considered in an insurance company to ensure the transparency of its governance structure? (e.g., the articles of association, the organization chart, any existing committees, the major shareholders, the ethical standard, corporate social responsibility, etc.)

1.2 Response

Swiss insurance companies must issue articles of association and organisational rules. The articles of association and any amendment to them must be filed with the competent commercial registry office and, thus, are publicly available. Furthermore, members of the board of directors must be registered in the commercial register and, therefore, the composition of the board of directors of an insurance company is publicly available.

Under Swiss insurance laws and regulations, insurance companies, groups and conglomerates, in principle, must publish a report on their financial condition (art. 111a ISO), in particular, including information about corporate governance and risk management. The information about corporate governance has to at least include the composition of the board of directors and management board as well as certain information regarding risk management (*e.g*. the system used including strategy, methods and processes as well as description and implementation of the function risk management, internal revision and compliance) including any changes during the reporting period (Circular 2016/2, margin no. 35 et seqq.). Insurance companies and conglomerates must further include in particular (i) a description of their legal structure, (ii) a listing of the main subsidiaries and shareholdings showing the qualitative or quantitative shareholding structure and (iii) a listing of branches with a significant share of the business in relation to the parent company

(Circular 2016/2, margin no. 86 et seq.). For listed insurance companies similar rules apply (*cf.* DCG, annex).

Under the current draft for a revision of the CO, the board of directors of listed insurance companies is obliged to disclose and explain gender benchmarks not complied with for the board of directors or the executive in its compensation report (*cf.* art. 734f CO), see response IV3.2.

Furthermore, insurance companies may decide to publish on a voluntary basis their ethical and corporate social responsibility standards, if any.

The combination of the publicly available information, such as the composition of the board of directors and the articles of association and the financial condition report as well as ethical and corporate social responsibility standards ensure transparency of the governance structure of an insurance company.

2 Question 2

2.1 Question

Are there any governance practices that, in your opinion, can best be achieved through disclosure rather than through specific supervisory requirements? Which governance practices should be mandatory for an insurance company?

2.2 Response

In general, the safeguarding of interests of insured persons can rather be achieved through regulation than disclosure.

Sensible remuneration practices might be achieved rather through disclosure than through supervisory requirements. Detailed supervisory restrictions on remuneration would cause various difficulties. On the one hand, it would be difficult to design such restrictions in a way that they may be applied with due consideration to the principle of proportionality, *i.e.* appropriate for each individual company. On the other hand, detailed supervisory restrictions on remuneration would very likely cause competitive disadvantages with regard to the hiring process. In this context, the OaEC requires listed companies to *e.g.* prepare a compensation report providing for transparency in remuneration related matters, see response I1.2.

Another example would be the disclosure of the percentage of the under-represented gender in a board of directors or the executive as well as the corresponding reasons and measures taken to counter this misbalance as envisaged in the current draft of the revised CO. Gender equality with respect to representation in the board of directors or the executive might be better achieved through disclosure of explanations and measures taken to counter the misbalance than dictation of hard benchmarks. Such a regulation leaves room for non-compliance if, given the market situation, companies simply cannot find suitable candidates. In addition, disclosed information in compensation reports can give guidance to potential candidates on criteria against which their application is judged.

3 Question 3

3.1 Question

What is the interplay between market abuse regulations and other disclosure/transparency rules applicable to listed insurers and industry specific rules applicable only to insurance companies?

3.2 Response

Market abuse rules as part of the Swiss financial market regulation are governed by the Swiss Federal Financial Market Infrastructure Act ("**FMIA**") and apply to listed companies, including listed insurance companies.

In Switzerland, market abuse, such as insider trading and market manipulation, are subject to administrative and possibly criminal sanctions. FINMA investigates and sanctions insider trading (art. 142 FMIA) and market manipulation (art. 143 FMIA) by all market participants, both individuals and legal entities, regardless of whether or not they are subject to prudential supervision (art. 145 FMIA). Criminal offences involving market abuse (art. 154 and 155 FMIA) are prosecuted by the Office of the Attorney General (art. 156 FMIA).

Under Swiss supervisory law, an insurance company and its auditor must immediately report to FINMA any incident that is of substantial importance to the supervision (art. 29 para. 2 FINMASA). The duty of disclosure includes, in particular, (i) solvency endangering incidents, (ii) criminal or administrative proceedings against the insurance company or its members of the board of directors or management board, (iii) reduction of a participation in another company if the holding falls below certain thresholds (10, 20, 33 or 50 per cent of capital or voting rights) or if the other company is no longer deemed to be a subsidiary and (iv) incidents attracting media attention (FINMA's circular 2008/25 Duty of Disclosure Insurance Companies, margin no. 1 et seq.). Furthermore, insurance companies, groups and conglomerates must submit an audited annual report to FINMA (art. 25 ISA) and publish a financial condition report (art. 111a ISO; Circular 2016/2, margin no. 1 et seq.).

In terms of disclosure and other listing obligation, listed insurance companies must publish an annual report, comprising audited financial statements and a corresponding audit report (art. 49 of the SIX Swiss Exchange Listing Rules ("**SIX LR**")), and a semi-annual report (art. 50 SIX LR). In addition, a listed insurance company, in principle, must disclose potentially price-sensitive facts, not known publicly, arising in its sphere of activity as soon as it becomes aware of the main points of the price-sensitive facts (so-called *ad hoc* publicity; art. 53 et seq. SIX LR). Furthermore, members of the board of directors and the management board of a listed insurance company must disclose D&O transactions in the company's equity securities, convertible and purchase rights on the company's shares, and financial instruments to the insurance company (art. 56 SIX LR). Finally, significant shareholders, acting individually or in concert, and their participation have to be disclosed if their holding crosses certain thresholds (3, 5, 10, 15, 20, 25, 33 1/3, 50 or 66 2/3 per cent of voting rights)(art. 120 para. 1 FMIA).

Against this background, disclosure and transparency rules regarding listed companies provide for a stricter understanding of a 'level playing field' and aim to ensure that price-sensitive information is disseminated on an equal basis. Insurance laws and regulations rather aim at ensuring FINMA's monitoring function for the protection of the insured persons. Consequently, whereas market abuse regulations, in principle, strive for investor protection, insurance supervisory law primarily seeks to safeguard the interests of the insured.

Both bodies of rules may interplay as follows: A listed insurance company may have to report to FINMA information that as well might be subject to disclosure requirements under the SIX LR. On the other hand, a listed insurance company that might be subject to an administrative proceeding or investigation by FINMA may have to disclose this fact under the SIX LR. In addition, under both bodies of rules, insurance regulation and the SIX LR, listed insurance companies must disclose their financial condition to some extent. Furthermore, FINMA may instigate an investigation, in particular, based on information obtained from exchanges.

VI Outlook

> In respect of the corporate governance of insurers, please describe your criticisms on the system in your jurisdiction, any recommendations for the future, and/or the main challenges which insurance undertakings encountered.

In Switzerland, regulation on corporate governance in general and with regard to insurers in particular, has become more important and more restrictive.

FINMA in several instances and explanatory papers emphasizes its endeavor towards a principle-based approach and the principle of proportionality. A rule-based approach provides more flexibility on the consideration of the principle of proportionality and, in particular, gives the leeway for a dynamic and appropriate application of the rules and regulations. Nevertheless, new insurance supervisory regulation sometimes ultimately still appears to be rather rule-based than principle-based.

However, in this context it is noteworthy that, on the one hand, authors in Swiss legal literature and voices in the insurance industry criticise FINMA to tend to follow a rule based approach. On the other hand, financial institutions and their advisors often seek for guidance and legal certainty - ultimately leading to a more rule based approach providing, in principle, for enhanced legal certainty. To this extent all involved parties might have to aim for and work towards a more principle based regulation.

Finally, Swiss corporate legislation is currently undergoing a major revision. The revision pursues, *inter alia,* improving corporate governance, in particular, shareholder protection, gender equality and control mechanisms. This will have as well an impact on insurance companies in the legal form of a corporation in future. It is, however, unlikely that the new provisions will be enacted and enter into force before 2020 or 2021.