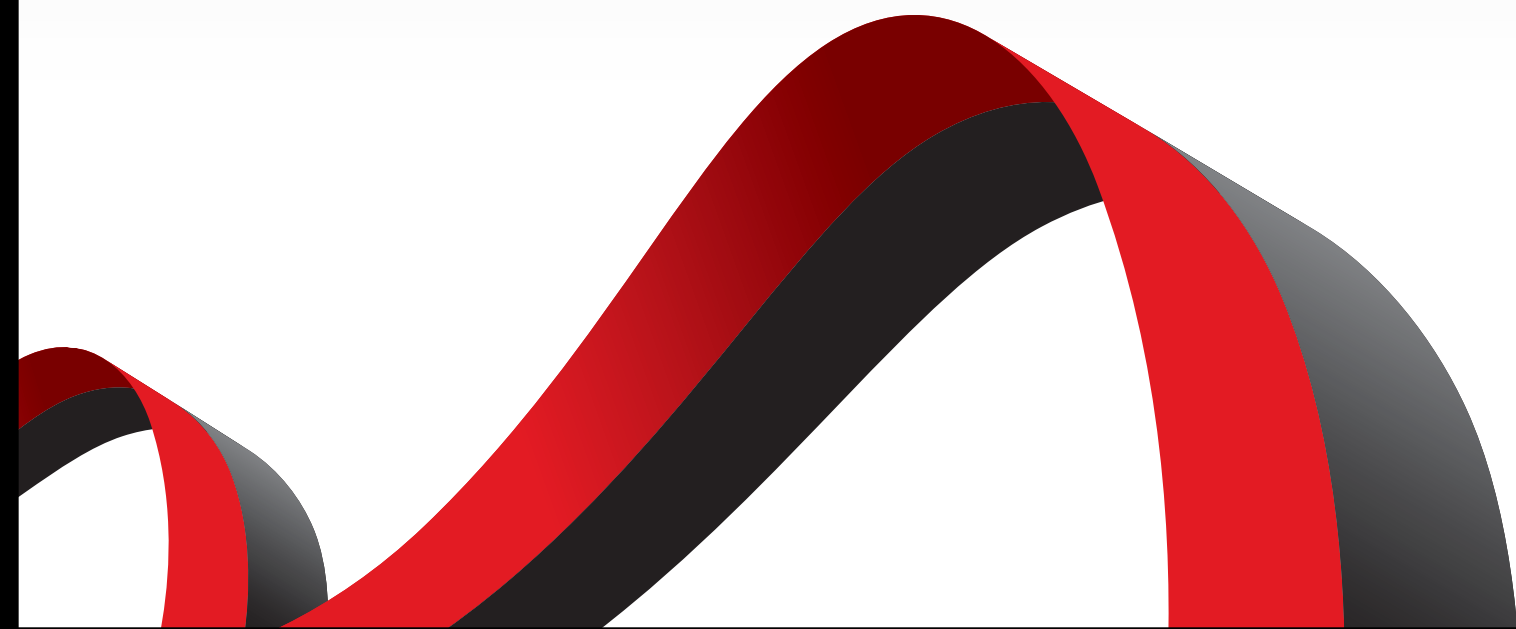


Federal Securities Law Blog

SEC Updates:

**Staying Ahead of the
Regulatory Curve**



A relationship of a
different stripe.

porterwright

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SEC Confirms Use of Social Media for Company Announcements

April 2, 2013 | Erin F. Siegfried

The SEC issued a [report](#) today that clarifies that companies may use social media outlets to make key announcements in compliance with Regulation FD (Fair Disclosure) so long as investors have previously been alerted about which social media outlet(s) will be used to disseminate such information.

Regulation FD requires companies to distribute material information in a manner reasonably designed to get that information out to the general public broadly and non-selectively. Companies should review the SEC guidance issued in 2008 regarding the dissemination of information via websites, as that guidance also applies to questions relating to communication through social media.

The SEC report relates to an inquiry by the Division of Enforcement into a post made by Netflix CEO, Reed Hastings, on his



personal Facebook page that Netflix's monthly online viewing had exceeded one billion hours for the first time. The SEC did not initiate enforcement action or allege wrongdoing by Hastings or Netflix, recognizing that there has been market uncertainty about the application of Regulation FD to social media?

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SEC Social Media Guidance — Tread Carefully

April 5, 2013 | Erin F. Siegfried

As discussed in a [post](#) on April 2, 2013, the SEC issued a report on that date that contained guidance on the use of social media to publicly disclose material information under Regulation FD.

The report centered on the SEC investigation of Netflix and Netflix CEO, Reed Hastings, and whether Regulation FD was violated when Mr. Hastings disclosed on his Facebook page favorable news about the number of hours that Netflix streamed in a month. The SEC decided not to bring enforcement action against Netflix or Mr. Hastings, making recognition that there has been market uncertainty about the application of Regulation FD to social media.

Regulation FD provides that a public company, or anyone acting on its behalf, may not disclose material, nonpublic information to market professionals or securityholders when it is reasonably foreseeable that someone may trade on the basis of the information, unless such information is simultaneously disclosed to the public in a method reasonably designed to provide broad, non-exclusionary distribution of information to the public.

It is important to remember that whether disclosures comply with Regulation FD must be evaluated on a case-by-case basis. The SEC stated in the report that the disclosure of material nonpublic information on the personal social media site of a corporate officer, **without advance notice to investors that the site may be used for this purpose**, is unlikely to satisfy Regulation FD. The SEC explained that this is true regardless of the number of subscribers. The report focused on the fact that a company must notify the market about which forms of communication, including the social media channels, it intends to use for the dissemination of material nonpublic information.

The SEC expects issuers to rigorously examine the factors outlined in its

[2008 website guidance](#) that are taken into account when determining whether a particular channel is a recognized channel of distribution for communicating with investors. A company should ask itself several questions. Is the proposed channel of distribution one that is practical for investors to monitor? Do investors need “lead time” to register to use the channel of distribution? Is the company comfortable using only that channel of distribution for communications to



investors? In any event, the company must be confident that the channel of distribution will provide for broad, non-exclusionary distribution of information to the public and it must provide adequate advance notice of the use of such channel to its investors. As best practices continue to evolve, companies should

strongly consider continuing to use press releases, conference calls, and current reports on Form 8-K in addition to any social media channels to distribute material nonpublic information.

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SEC Adopts Final Rules for Disclosing Use of Conflict Minerals

Aug. 24, 2012 | [Robert J. Tannous](#)

On August 22, 2012, the Securities and Exchange Commission ("SEC") adopted a new form and [final rule](#) pursuant to Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") requiring companies to publicly disclose their use of conflict minerals that originated in the Democratic Republic of the Congo ("DRC") or an adjoining country. Section 1502 added Section 13(p) to the Securities Exchange Act of 1934 (the "Exchange Act"), which requires the SEC to promulgate rules requiring issuers to disclose their use of conflict minerals that include tantalum, tin, gold, or tungsten if those minerals are "necessary to the functionality or production of a product" manufactured by those companies and whether any of those minerals originated in the DRC or an adjoining country.

If an issuer's conflict minerals originated in the DRC or an adjoining country, Section 13(p) of the Exchange Act requires the issuer to provide disclosure on a new Form SD to be filed with the SEC that includes (1) a description of the measures it took to exercise due diligence on the conflict minerals' source and chain of custody (including an independent private sector audit of the report that is conducted in accordance with standards established by the U.S. Comptroller General), and (2) a description of the products manufactured or contracted to be manufactured that are not "DRC conflict free" the facilities used to process the conflict minerals, the country of origin of

the conflict minerals, and the efforts to determine the mine or location of origin. Section 13(p) of the Exchange Act also requires the information disclosed by the issuer to be available to the public on its Internet website.

Issuers are required to file the Form SD for the calendar year beginning January 1, 2013 with the first reports due May 31, 2014 and annually on May 31 every year thereafter.



The following is a Fact Sheet published by the SEC in its August 22, 2012 [press release](#):

FACT SHEET
Disclosing the Use of Conflict Minerals

Background

In 2010, Congress passed the Dodd-Frank Act, which directs the Commission to issue rules requiring certain companies to disclose their use of conflict minerals if those minerals are “necessary to the functionality or production of a product” manufactured by those companies. Under the Act, those minerals include tantalum, tin, gold or tungsten.

Congress enacted Section 1502 of the Act because of concerns that the exploitation and trade of conflict minerals by armed groups is helping to finance conflict in the DRC region and is contributing to an emergency humanitarian crisis. Section 1502 of the Act amends the Securities and Exchange Act of 1934 to add Section 13(p).

The Rule

The final rule applies to a company that uses minerals including tantalum, tin, gold or tungsten if:

- The company files reports with the SEC under the Exchange Act.
- The minerals are “necessary to the functionality or production” of a product manufactured or contracted to be manufactured by the company.

The final rule requires a company to provide the disclosure on a new form to be filed with the SEC (Form SD).

Contracting to Manufacture:

A company is considered to be “contracting to manufacture” a product if it has some actual influence over the manufacturing of that product. This determination is based on facts and circumstances, taking into account the degree of influence a company exercises over the product’s manufacturing.

A company is not be deemed to have influence over the manufacturing if it merely:

- Affixes its brand, marks, logo, or label to a generic product manufactured by a third party.
- Services, maintains, or repairs a product manufactured by a third party.
- Specifies or negotiates contractual terms with a manufacturer that do not directly relate to the manufacturing of the product.

The requirements apply equally to domestic and foreign issuers.

Determining Whether Conflict Minerals Originated in the DRC or Other Covered Countries:

Under the final rule, a company that uses any of the designated minerals is required to conduct a reasonable ‘country of origin’ inquiry that must be performed in good faith and be reasonably designed to determine whether any of its minerals originated in the covered countries or are from scrap or recycled sources.

If the inquiry determines either of the following to be true:

- The company knows that the minerals did not originate in the covered countries or are from scrap or recycled sources.
- The company has no reason to believe that the minerals may have originated in the covered countries or may not be from scrap or recycled sources.

... then the company must disclose its determination, provide a brief description of the inquiry it undertook and the results of the inquiry on Form SD.

The company also is required to:

- Make its description publicly available on its Internet website.
- Provide the Internet address of that site in the Form SD.

If the inquiry otherwise determines both of the following to be true:

- The company knows or has reason to believe that the minerals may have originated in the covered countries.
- The company knows or has reason to believe that the minerals may not be from scrap or recycled sources.

... then the company must undertake "due diligence" on the source and chain of custody of its conflict minerals and file a Conflict Minerals Report as an exhibit to the Form SD.

The company also is required to:

- Make publicly available the Conflict Minerals Report on its Internet website.

- Provide the Internet address of that site on Form SD.

What Must Be Included in the Conflict Minerals Report:

Under the final rule, companies that are required to file a Conflict Minerals Report must exercise due diligence on the source and chain of custody of their conflict minerals. The due diligence measures must conform to a nationally or internationally recognized due diligence framework, such as the due diligence guidance approved by the Organisation for Economic Co-operation and Development (OECD).

DRC Conflict Free — If a company determines that its products are "DRC conflict free" — that is the minerals may originate from the covered countries but did not finance or benefit armed groups — then the company must undertake the following audit and certification requirements:

- Obtain an independent private sector audit of its Conflict Minerals Report
- Certify that it obtained such an audit
- Include the audit report as part of the Conflict Minerals Report
- Identify the auditor

Not Been Found to Be "DRC Conflict Free" — If a company's products have not been found to be "DRC conflict free," then the company in addition to the audit and certification requirements must describe the following in its Conflict Minerals Report:

- The products manufactured or contracted to be manufactured that have not been found to be "DRC conflict free."

- The facilities used to process the conflict minerals in those products.
- The country of origin of the conflict minerals in those products.
- The efforts to determine the mine or location of origin with the greatest possible specificity.

DRC Conflict Undeterminable — For a temporary two-year period (or four-year period for smaller reporting companies), if the company is unable to determine whether the minerals in its products originated in the covered countries or financed or benefited armed groups in those countries, then those products are considered “DRC conflict undeterminable.”

In that case, the company must describe the following in its Conflict Minerals Report:

- Its products manufactured or contracted to be manufactured that are “DRC conflict undeterminable.”
- The facilities used to process the conflict minerals in those products, if known.
- The country of origin of the conflict minerals in those products, if known.
- The efforts to determine the mine or location of origin with the greatest possible specificity.
- The steps it has taken or will take, if any, since the end of the period covered in its most recent Conflict Minerals Report to mitigate the risk that its necessary conflict minerals benefit armed groups, including any steps to improve due diligence.

For those products that are “DRC conflict undeterminable,” the company is not required to obtain an independent private sector audit of the Conflict Minerals Report regarding the conflict minerals in those products.

Recycled or Scrap Due Diligence — There are special rules governing the due diligence and Conflict Minerals Report for minerals from recycled or scrap sources. If a company’s conflict minerals are derived from recycled or scrap sources rather than from mined sources, the company’s products containing such minerals are considered “DRC conflict free.”

If a company cannot reasonably conclude after its inquiry that its gold is from recycled or scrap sources, then it is required to undertake due diligence in accordance with the OECD Due Diligence Guidance, and get an audit of its Conflict Minerals Report. Currently, gold is the only conflict mineral with a nationally or internationally recognized due diligence framework for determining whether it is recycled or scrap, which is part of the OECD Due Diligence Guidance.

For the other three minerals, if a company cannot reasonably conclude after its inquiry that its minerals are from recycled or scrap sources, until a due diligence framework is developed, the company is required to describe the due diligence measures it exercised in determining that its conflict minerals are from recycled or scrap sources in its Conflict Minerals Report. Such a company is not required to obtain an independent private sector audit regarding such conflict minerals.

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Lawsuit Challenges SEC Rules on Conflict Minerals

Oct. 22, 2012 | [Robert J. Tannous](#)

On Oct. 22, 2012, the U.S. Chamber of Commerce, the National Manufacturers Association, and the Business Roundtable filed a lawsuit in the for the DC Circuit seeking to modify or eliminate the Securities and Exchange Commission's ("SEC") final rules governing conflict minerals. The SEC adopted the final rules on conflict minerals on August 22, 2012 pursuant to Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") requiring companies to publicly disclose their use of conflict minerals that originated in the Democratic Republic of the Congo ("DRC") or an adjoining country. See SEC Adopts Final Rules for Disclosing Use of Conflict Minerals (posted August 24, 2012). The lawsuit did not contain any legal arguments or explanations for the

requested modification.

In a joint statement, the U.S. Chamber of Commerce and the National Manufacturers Association stated, "[t]he final conflict mineral rule imposes an unworkable, overly broad and burdensome system that will undermine jobs and growth and may not achieve Congress's overall objectives." According to a report in the Wall Street Journal, the SEC estimated that approximately U.S. and foreign companies would have to comply with the conflict-minerals rules with an upfront cost of \$3 billion to \$4 billion dollars and an additional \$200 million annually.

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SEC Issues FAQs on Conflict Minerals & Resource Extraction

May 31, 2013 | Robert J. Tannous

On May 30, 2013, the Securities and Exchange Commission (“SEC”) issued [12 Frequently Asked Questions](#) (“FAQs”) providing guidance on various aspects of Securities Exchange Act of 1934 (“Exchange Act”) Section 13(p), Rule 13p-1 and Item 1.01 of Form SD relating to disclosure regarding the use of conflict minerals from the Democratic Republic of the Congo or adjoining countries.

The Guidance offered by the Conflict Minerals FAQs includes:

- The conflict mineral rule applies to all issuers that file reports with the SEC under Exchange Act Sections 13(a) or 15(d), whether or not the issuer is required to file such reports.
- An issuer that only engages in those activities customarily associated with mining, including gold mining of lower grade ore, is not considered to be “manufacturing” those minerals.
- An issuer must determine the origin of conflict minerals, and make any required disclosures regarding conflict minerals, for itself and all of its consolidated subsidiaries.
- An issuer that specifies that its logo be etched into a generic product that is manufactured by a third party is not considered to be “contracting to manufacture” the product.
- An issuer is required to conduct a reasonable country of origin inquiry with respect to conflict minerals included in generic components included in products it manufactures or contracts to manufacture. There is no distinction between the components of a product that an issuer directly manufactures or contracts to manufacture and the “generic” ones it purchases to include in a product.
- The packaging or container that contains a conflict mineral sold with a product is not considered to be part of the product.
- An issuer that manufactures or contracts for the manufacturing of equipment they use in providing a service they sell is not required to report on the conflict minerals in that equipment.
- An issuer that manufactures or contracts for the manufacturing of



any tools, machines, or other equipment that contain conflict minerals for it to use in the manufacture of products, are not considered products, even if such tools, machines, or other equipment are later sold.

- Following an initial public offering, the issuer must start providing conflict mineral reporting for the first reporting calendar year that begins no sooner than eight months after the effective date of its initial public offering registration statement.
- The failure to timely file a Form SD regarding conflict minerals does not cause an issuer to lose eligibility to use Form S-3.

On the same day, the [SEC issued 9 FAQs](#) providing guidance on various aspects of Exchange Act Section 13(q), Rule 13q-1 and Item 2.01 of Form SD, which require disclosure of certain payments made by resource extraction issuers to foreign governments or the U.S. federal government for the purpose of the commercial development of oil, natural gas or minerals.

The Guidance offered by the Resource Extraction FAQs includes:

- A reporting issuer that is not engaged in commercial development of oil, natural gas or minerals itself but whose subsidiary or entity under its control engages in those activities would be considered a resource extraction issuer and would be subject to the disclosure requirement.
- A company that provides services associated with the exploration, extraction, processing and export of

a resource will not be considered a “resource extraction issuer.”

- A company providing transport services will not generally be considered to be a resource extraction issuer unless the activities are directly related to the export of the resource.
- Penalties and/or fines related to resource extraction paid to government agencies are not reportable as fees.
- A resource extraction issuer is not permitted to provide the payment information on an accrual basis, but rather on an unaudited, cash basis for the year in which the payments are made.
- If a resource extraction issuer has many sources of income in a particular country and pays corporate level income tax on the consolidated amount, the issuer does not have to segregate income to report the amount corresponding solely to resource extraction activities. A resource extraction issuer may elect to segregate income from exploration, extraction, processing and export from income earned on other business activities in a particular country and disclose income taxes paid solely on the income generated by the commercial development activities.
- The failure to timely file a Form SD regarding payments by resource extraction issuers does not cause an issuer to lose eligibility to use Form S-3.

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New NASDAQ and NYSE Standards for Compensation Committee Independence

Oct. 16, 2012 | Jack Gravelle

The NYSE and NASDAQ have proposed respective rule changes to comply with new [SEC Rule 10C-1](#), which requires the Exchanges to create new listing standards requiring each member of a listed company's compensation committee to be independent. Rule 10C-1 implements provisions of the Dodd-Frank Act that also require additional standards regarding compensation consultants.

The [new NYSE listing standards](#)

require the board of directors to consider all material factors relevant to independence from management when determining the independence of a compensation committee member, including:

1. the source of the director's compensation (consulting, advisory, other compensation fees, etc.) and whether such compensation would impair the director's ability to make independent judgments about executive compensation; and
2. affiliate relationships and whether the director is under the control of

the listed company and its management as a result of such relationships.

The [new NASDAQ rules](#) require listed companies to have a compensation committee of at least two independent directors, both of whom are prohibited from accepting any consulting, advisory or

other compensatory fee from the issuer or any subsidiary. In determining compensation committee members, the board must consider affiliations with the company to ensure no affiliations might affect the director's

judgment about management compensation.

Both the NYSE and NASDAQ rules require a compensation committee charter that specifies consideration of the six factors described in Rule 10C-1 when retaining compensation consultants, including:

1. provision of other services to the company by the person that



- employs the compensation consultant;
2. amount of fees paid by the company to the person that employs the compensation consultant, as a percentage of that person's total revenue;
 3. policies and procedures of the person that employs the compensation consultant regarding the prevention of conflicts of interest;
 4. any business or personal relationship of the compensation consultant with any member of the committee;
 5. ownership by the compensation consultant of the company's stock; and

6. any business or personal relationship between the compensation consultant or the person that employs the compensation consultant and any executive officer of the company.

Assuming SEC approval, NYSE listed companies must comply by the earlier of (i) the company's first annual meeting after Jan. 15, 2014, or (ii) October 31, 2014. NASDAQ listed companies must comply by the earlier of (i) the second annual meeting after the date of SEC approval or (ii) Dec. 31, 2014.

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SEC Approves SRO Listing Standards Relating to Independence of Compensation Committees

Jan. 17, 2013 | [Erin F. Siegfried](#)

The SEC has approved the listing standard changes relating to compensation committee independence and consultants for both [NASDAQ](#) and the [NYSE](#).

The proposed listing standards implement Rule 10C-1 under the Securities Exchange Act of 1934, which was added by the Dodd-Frank Act.

With respect to the NASDAQ listing standard changes, most listed companies will be required to comply with the new rules, but NASDAQ has exempted "smaller reporting companies" from compliance. First, by July 1, 2013, the listed company must have a formal written charter that provides:

- The compensation committee will review and reassess the adequacy of the charter on an annual basis;
- The scope of the committee's responsibilities and how it carries out those responsibilities, including structure, processes, and membership requirements;
- The committee's responsibility for determining or recommending to the board for determination, the compensation of the CEO and all other executive officers of the company, and provide that the CEO may not be present during voting or deliberations on his or her compensation; and
- The committee's responsibilities

and authority with respect to retaining its own advisers; appointing, compensating, and overseeing such advisers; considering certain independence factors before selecting advisers; and receiving funding from the company to engage them.

The compensation committee may select, or receive advice from, a compensation consultant, legal counsel or other adviser, other than in-house legal counsel, only after taking into consideration the following factors:

- The provision of other services to the company by the person that employs the compensation consultant, legal counsel or other adviser;



- The amount of fees received from the company by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser;
- The policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;
- Any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee;
- Any stock of the company owned by the compensation consultant, legal counsel or other adviser; and
- Any business or personal relationship of the compensation consultant, legal counsel or other adviser or the person employing the adviser with an executive officer of the company.

The rule clarifies that nothing in the rule requires a compensation consultant, legal counsel or other adviser to be independent, only that the committee considered the enumerated independence factors before selecting, or receiving advice from, a compensation adviser. Further, the committee is not required to conduct an independence assessment for a compensation adviser that acts in a role limited to the following activities for which no disclosure is required: (a) consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the company, and that is

available generally to all salaried employees; and/or (b) providing information that either is not customized for a particular company or that is customized based on parameters that are not developed by the adviser, and about which the adviser does not provide advice.

By the earlier of a listed company's first annual meeting after Jan. 14, 2014, or Oct. 14, 2014, the company's compensation committee must comply with the new director independence standards applicable to the compensation committee. The listed company must have a compensation committee composed of at least two members, each of whom must be an independent director as defined in NASDAQ's rules, and not accept directly or indirectly any consulting, advisory or other compensatory fee from the listed company or any of its subsidiaries, not including (i) fees received as a member of the compensation committee, the board of directors, or any other board committee; or (ii) the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the company, provided that such compensation is not contingent in any way on continued service. The board must also consider whether a director is affiliated with the company and whether such affiliation would impair the director's judgment as a member of the compensation committee.

A listed company must certify to NASDAQ, no later than 30 days after the final implementation deadline applicable to it, that it has complied with the committee charter and independence provisions.

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Could This Happen Here?

March 7, 2013 | [Erin F. Siegfried](#)

Last weekend, voters in Switzerland strongly backed a plan giving shareholders unprecedented authority over executive pay. The Minder Initiative, named after the Swiss businessman who created it, was supported by approximately 68% of Swiss voters. The measure gives shareholders of Swiss companies the power to approve or block proposed compensation for executives and directors.



Novartis AG and UBS AG are two of the multinational companies listed in Switzerland that will be affected by the Minder proposals. The proposals now go to the government for legislative drafting. Implementation is not expected until 2014 at the earliest.

Switzerland has provided a supportive environment for Mr. Minder's ideas. In 2008, the Swiss government was forced to bail out UBS, the country's largest bank. Also lending support to the success of the Minder Initiative was Daniel Vasella, the departing chairman of Novartis. He was to receive 72 million Swiss francs (\$76 million) over six years as part of his exit. Novartis went back to the drawing board on Mr. Vasella's package after it created backlash among the Swiss people.

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