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## **The position of the Swedish Corporate Governance Board on the issue of individual ballots and automatic counting of votes at the election of company directors**

The Swedish Corporate Governance Board has received a letter from a number of international institutional investors regarding the introduction of a rule in the Swedish Corporate Governance Code concerning elections to company boards, see Appendix 1 ("The Institutional Investors"). Similar claims were also submitted by Norges Bank Investment Management ("NBIM"), Appendix 2. The Second and Third Swedish National Pension Funds (AP2 and AP3) have also expressed support for the international investors' demands.

According to the investors in question, it should be mandatory for nomination committees of listed companies' to present their nominations as a set of individual proposals, one for each proposed member of the board, and that voting at the shareholders' meeting should take place individually for each proposed candidate. Furthermore, each vote count should be conducted individually and each result should be recorded in the minutes.

According to the proponents, this process is standard in most leading countries, and the Swedish model of presenting an overall proposal for the board is regarded as outdated. The proposal would provide better governance by strengthening owners' ability to hold individual members accountable. The proponents also claim that Swedish company presents obstacles to investors' opportunities to bring about such a model.

The Board appreciates the international investors' commitment to respect Swedish corporate governance and the rules of the Swedish Code and has carefully considered the views they have expressed. The Board believes, however, that Swedish company law and the Swedish Code allow individual shareholders to request a ballot for each director and to request a vote count for each decision at the shareholders' meeting. International shareholders can also utilise these opportunities through the proxies who represent them.

Furthermore, the Board would like to emphasize that process whereby the election of directors at shareholders' meetings of Swedish listed companies often takes the form of a vote on the board as a whole, not per director, is a product of the unique Swedish way of preparing these elections in shareholder-led nomination committees. If no other candidates to the company board are proposed at the shareholders' meeting and no one requests an alternative procedure, a vote on the committee's proposal is a natural procedure.

In the light of the opportunities that Swedish company law provides and the well-functioning practices that currently exist within companies and their nomination committees, the Corporate Governance Board does not find sufficiently strong grounds for introducing rules into the Code which stipulate individual ballots or automatic counting of votes at the election of directors.

The Board has therefore decided to leave it to each company and its shareholders to decide upon how to conduct board elections at each shareholders' meeting, while it notes that it is in each shareholder's power to request a count of votes if he or she desires.

This is an important issue, however, and the Board will continue to monitor both international developments and the actions of Swedish companies. International and institutional investors are of great importance to the supply of capital to the Swedish corporate sector. It is the Board's hope that their confidence in Swedish corporate governance, also with regard to board elections, remains intact after the clarifications presented in this position paper.

## **1. Swedish law**

### **1.1. The Companies Act**

According to the Companies Act (2005:551), members of the board of directors are elected by the shareholders' meeting, unless the company's articles of association stipulate otherwise. This does not apply to employee representatives on the board. In a public limited company, however, a majority of the directors on the board, which must contain a minimum of three directors, are to be appointed by the shareholders' meeting.

Nominations to positions on the board may be submitted by the board of directors and by each individual shareholder, regardless of the size of the shareholding. The agenda item "election of the board" is mandatory at the annual general meeting according to most companies' articles of association. Nominations to positions on the board may be submitted prior to the meeting or at the meeting itself before the elections have taken place. If a shareholder has submitted a nomination in such good time prior to the notice of the meeting being issued that the proposal can be included in the notice, should the main contents of the proposal are to be included in the notice. A guideline clause in the Companies Act that says if a proposal is submitted to the board no later than seven weeks before the meeting, the proposal must be included in the notice.

Proposals regarding individual ballots are always to be included in the notice if they are submitted within the time specified above prior to the meeting. If at the meeting there are more nominees than the number of available seats on the board, individual ballots are always to be conducted. The Companies Act states that the nominee who receives the most votes is elected. This means that if one director is to be elected, and the lone candidate only receives one vote, he or she is to be deemed elected, regardless of whether the other shareholders vote against the candidate. At elections, a vote against and an abstention are the same thing from company law perspective. When the election is for more than one seat on the board, the vote can be conducted either individually or collectively, depending on the proposals presented.

The normal procedure for the election of directors is that the shareholders' meeting first decides, within the limits set by the articles of association, the number of directors. If there is a single proposal containing all nominations to the board of

directors and this corresponds to the number of seats that the meeting has decided, then from the corporate law perspective there is no need to divide the election into separate ballots per person. If a request for individual ballots has been submitted as a specific proposal to the shareholders' meeting and therefore been included in the notice of meeting or if it is presented at the meeting, the chair may put the question of individual ballots to the meeting. The decision on this question of procedure is to be taken by majority vote at the meeting.

If there are other nominees to positions on the board, so that the number of candidates exceeds the number of vacant seats on the board, individual ballots are always to be conducted.

Voting in elections is open, unless the shareholders' meeting specifically decides, by a simple majority (in public companies), that the vote is to be closed. The Companies Act includes a requirement for individual counts if requested by shareholders. Such requests must be made at the meeting "before a vote". This means that the request can be made after an agenda item has commenced, but prior to any kind of voting on that item. If such a count is requested, the minutes are to state:

- the number of votes cast for and against,
- the number of votes that the shareholders present refrained from casting,
- the number of shares for which votes were cast, and
- the percentage of share capital represented by those votes.

This means that the company must be prepared to count all shareholders' votes. There is no requirement that the exact count of the votes must be presented at the meeting. It is sufficient that this information is only included in the minutes.

## 1.2. The Code

The Swedish Corporate Governance Code ("the Code") states that nomination committees are to submit candidates for the chair and other members of the board. The nomination committee's proposals are to be presented in the notice of meeting. The Code does not specify whether the nomination committee's proposals are to take the form of a single proposal or a number of individual proposals.

If a shareholder submits nominations to the nomination committee or proposes that the nomination committee submit its proposal as a number of individual nominations, it is for the nomination committee to consider the shareholder's motion as a part of its work. The nomination committee is not obliged to present the proposals it has received to the shareholders' meeting.

## 1.3. Do the Companies Act and the Code make it impossible for shareholders represented by proxy to request an individual ballot and vote count at the election of directors?

Institutional shareholders usually give a voting proxy to a proxy adviser. The proxy adviser compiles the individual listed company's proposals that are presented in the notice of meeting into a voting instruction form, on which the shareholder can mark

how voting rights are to be exercised for the various issues. The proxy adviser then authorizes a person based in Sweden to attend the shareholders' meeting and vote in accordance with the written voting instruction.

According to the Institutional Investors, current Swedish practice means that:

- the requirement that they must attend the meeting in order to bring about individual ballots prevents them from using this option,
- shareholders who exercise their voting rights through proxy voting (absentee voting) have no chance to cast their individual votes, if the meeting decides on individual ballots, as the deadline for "proxy voting" will have passed.

NBIM argues that Swedish practice means that:

- if an alternative proposal containing nominations to the board of directors is presented at the meeting, individual ballots are to take place, but for practical reasons, shareholders who have submitted voting instructions before the meeting cannot to participate in such a vote, and
- a single proposal on the composition of the board forces the shareholders to vote for or against the whole proposal.

These conclusions are not entirely correct. There is nothing to prevent the voting instruction that proxy advisers prepare and present to institutional shareholders from containing a way for them to indicate how they would vote for each of the proposed directors, even if the nomination committee presents its nominations as a single proposal. This can be supplemented with an instruction as to whether the proxy is to demand individual ballots at the shareholders' meeting and how the proxy is to vote on this issue, as well as whether the proxy is to vote yes or no to the committee's proposal in the event that individual ballots are not conducted despite the motion. Further, the instruction can include an option for the owner to choose whether a request for individual vote counts is to be made at the meeting, which the local proxy is to execute the meeting. If individual counts are requested, these are always to be conducted.

## **2. Do individual ballots and vote counting at the election of directors provide better corporate governance?**

The Swedish nomination process and election of board members is in many respects unique in an international context. The main difference compared with other countries is that it is the owners - not the board of directors – who are responsible for the nomination process. The instructions to the nomination committee are set by the shareholders at the shareholders' meeting and nomination committees are dominated by representatives of the largest shareholders who wish to participate.

The work of nomination committees is usually conducted in such a way that the committee, on behalf of the shareholders' meeting, is to submit a balanced proposal of a board that can work together as an effective team, as well as fulfilling various criteria regarding expertise, experience, gender etc, which are stipulated in both the Code and the Companies Act. Feedback and criticism regarding individual directors can be channeled through the nomination committee - either through membership of the committee or by

submitting views to the committee - or be presented directly to the shareholders' meeting in connection with the election of directors.

According to the Institutional Investors and Norges Bank, however, better corporate governance and a more modern approach would be achieved by stipulating individual ballots and automatic vote counts at the election of directors. Sweden is one of few modern countries that still nominate all candidates to the board in a single proposal. According to this view, individual ballots and automatic counting provide the opportunity to hold individual directors accountable and to give more nuanced signals on what shareholders think of the board than voting against the entire proposal.

It is the opinion of the Corporate Governance Board that the Swedish model as it applies today – with the election of directors in a single decision where the number of candidates corresponds to the number of vacant seats on the board – functions efficiently and is actually more in tune with a modern view that the board of a company should be a carefully composed team where the individual members' skills and experiences complement each other and create a strong whole than is a board formed as a result of a number of individual ballots.

Nor does the Board agree with the conclusion reached by NBIM after an excellent analysis of the issue in its position paper Individual Vote Count in Board Elections, namely that the individual vote counts should always take place at the election of directors. The Board feels that the strongest argument for this conclusion, that it increases the individual director's accountability to shareholders, does not carry much weight in the Swedish system, where this accountability is already clear as a result of the stipulations in the Companies Act. Instead, the Board feels that the arguments against this model, in particular the danger that it might result in different directors being perceived to have different degrees of legitimacy as representatives of the shareholders and that their opinions may thus be accorded different importance in the work of their boards, which would not be beneficial for the climate of cooperation in a team of equals, carry greater weight.

Against this background, the Swedish Corporate Governance Board concludes that it will not stipulate that boards be elected through individual ballots for each nominated candidate. Instead, it leaves this issue to each company's shareholders to decide. Because each shareholder can always enforce a vote count, the Board is not of the opinion that the Code should state that vote counts are always to be conducted at the election of directors.

It would be unfortunate if Swedish corporate governance were to be perceived internationally as reactionary and protectionist by not taking into account the noteworthy demands of foreign owners. If Sweden is to deviate from what is internationally considered as constituting good practice it needs strong reasons to do so. The Swedish Corporate Governance Board is of the view that the reasons presented in this paper are of that nature.