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Amended Disclosure Regime for Major Shareholdings

In connection with the overhaul of Swiss financial market regulations, the rules on the disclosure of substantial shareholdings were recast into the Federal Act on Financial Markets Infrastructures of 19 June 2015 ("FMIA"). In September 2015, FINMA opened a hearing regarding its implementing ordinance ("FMIO-FINMA"). The final version of FMIO-FINMA was published on 9 December 2015. The new rules will enter into force on 1 January 2016 subject to a three-months transition period. To a large extent, they are a restatement of the existing regime. However, they provide for a number of changes that may have important implications for market participants.

A New Statutory Basis for Disclosure Duties

The new rules provide for a more detailed description of the disclosure duties in five articles instead of two provisions under the previous regime. Beyond cosmetic changes aiming to clarify the existing rules, the changes aim to create an express statutory basis for certain ancillary obligations that were until now set forth only in the implementing ordinance. This move was triggered by the Decision of the Swiss Supreme Court 2C_98/2013 of 29 July 2013, which held that the obligation imposed on persons who can exercise voting rights at their discretion was unconstitutional because it lacked an explicit statutory basis. In addition to correcting this point, the statute explicitly defines further scenarios that are treated like an acquisition or disposal and can consequently trigger an obligation to disclose shareholdings, such as the initial listing of shares, the conversion of participating certificates (*Partizipationsscheine*) and profit sharing certificates (*Genusscheine*) into shares, the exercise of options rights on shares, as well as other changes to the legal capital, e.g. capital increases or decreases.

Principal Changes in the Regulations

Asset Management and Delegation of Voting Rights (article 10 FMIO-FINMA)

As mentioned above, the new rules introduce a separate obligation for persons who can exercise voting rights on a discretionary basis to aggregate and disclose their shareholdings if they reach or cross a threshold. This obligation applies regardless whether the shareholder is also subject to a disclosure duty. Thus, if a shareholder grants discretionary voting powers to a third party, e.g. an asset manager investing through managed accounts, the shareholding will need to be disclosed by the shareholder as well as the person who can actually exercise discretion in voting the shares, even if they do not beneficially own the shares. However, the information on the disclosure statement will provide sufficient information to distinguish both set-ups.

This new obligation yields a number of questions that remain unanswered: since discretion is determining, the test is whether the person voting the shares can actually exercise discretion in the absence of specific instructions. However, it remains uncertain,

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if an employee who is responsible for setting the voting policy for a firm should also be treated as a person who can exercise the voting rights in its discretion. Moreover, the rules do not clarify from when on a person is deemed to have acquired the power to vote the shares in its discretion. In our view, based on the legislative materials, the grant of the power, rather than the actual exercise of discretion, should be determining. It is, however, uncertain whether a contingent grant of power, e.g. a right to vote pledged shares upon default of the creditor, should be accounted for from the outset or only once it can be exercised.

From a practical perspective, this change may have far reaching consequences for asset managers and financial intermediaries, who, therefore, should review their contractual documentation and voting policies regarding the exercise of voting rights in connection with shares held by collective investment schemes and managed accounts to determine whether they should aggregate client positions with their proprietary positions under the disclosure rules.

Shares held by Consolidated Groups as Indirect Holdings (article 11 FMIO-FINMA)

Another important change to the rules relates to the aggregation of shares held by a group of companies. Under the current regulations, there is a certain degree of uncertainty on how to aggregate shares held by a group of companies. Namely, shareholdings of subsidiaries can arguably be treated as indirect holdings of the parent company or the group of companies can be deemed to constitute a group of persons acting in concert, in which case the aggregated position of the group will be disclosed. The new rules bring some clarity to the situation by requiring consolidated groups to take the first approach and handle holdings of subsidiaries as indirect holdings of the parent.

The main advantage of this approach is that only entities holding shares directly and the ultimate beneficial owner will need to be disclosed under the new rules. Affiliates in the chain of control, by contrast, do not need to be disclosed. Therefore, changes in the chain of control will not need to be disclosed, thus avoiding filing requirements in the event of intra-group reorganisations. By contrast, a new disclosure statement will need to be filed if a new entity starts holding shares or if an entity fully disposes of its shareholdings.

As a result of this change, previous disclosure statements made on the basis of the "group concept" will need to be updated during the transitional period.

Equity Derivatives instead of Financial Instrument (article 15 FMIO-FINMA)

Apart from re-naming "financial instruments" as "equity derivatives" (because the former term has a broader definition under the FMIA), the new rules do not substantially change the disclosure rules applicable to equity derivatives. They continue to require all equity derivatives to be accounted for under the disclosure rules, regardless whether they provide for physical delivery or cash settlements.

Stepping back from its initial position in the consultation process, FINMA decided not to introduce an exemption for cash-settled exchange traded derivatives, because this proposal was not well received by market participants who clearly voiced a preference to maintain existing rules in place. Against this background, the new rules remain practically unchanged.

Securities Lending and Repurchase Agreements (article 17 FMIO-FINMA) and Usufruct

Contrary to the draft published in the hearing, the rules on securities lending will not be changed. The consultation paper proposed to delete the first paragraph of the current article 14 SESTO-FINMA regarding securities lending to treat such transactions under the general rule and require a disclosure in the event a party can exercise discretion in exercising voting rights. In the consultation process, a large majority of market participants voiced a preference for maintaining the existing regime unchanged, considering that the proposed approach was not easier to apply and did not contribute to making shareholdings more transparent.

Incidentally, FINMA pushed on with shares held in usufruct which are therefore no longer subject to a specific regime. Consequently, the person benefiting from an usufruct in shares will need to disclose its position only if it has, by virtue of the usufruct, a discretionary power to exercise the voting rights of the shares.

Collective Investment Schemes (article 18 FMIO-FINMA)

The rules on the disclosure of positions held by collective investment schemes remain in essence unchanged. Foreign investment schemes will continue to be able to disaggregate their positions from the rest of the group to which they belong, provided the management company or the investment scheme are sufficiently independent. In this context, the new rules explicitly provide that positions of foreign collective investment schemes that are not independent from the financial group that manages them need to be aggregated with the rest of the financial group.

As mentioned above, if the voting rights are exercised on a discretionary basis by an asset manager, it will be required to aggregate the position of the collective investment scheme with its own shareholdings.

Exemptions for Banks and Securities Dealers (article 19 FMIO-FINMA)

The current provisions with cumulative exemptions applying on trading book and securities lending are maintained in the new regime with a few adjustments. In line with the general move to a T+2 settlement cycle, the maximum holding period for the settlement exemption to apply has been reduced to two trading days. Furthermore, the new rules expressly provide that banks and securities dealers can decide whether or not they want to apply the exemption, thus departing from the current practice of the Federal Department of Finance, who considered that if the conditions of the exemption were satisfied, banks and securities dealers were required to apply it.

Content and Formalities of the Disclosure Statement (article 22 FMIO-FINMA)

As regards the content and formalities of the notification, there are a few changes that will impact daily operations. For example, the new rules no longer require filers to submit, in addition to an electronic filing, the original by mail. Moreover, the exact address of the legal entity filing the disclosure statement is no longer required on the disclosure statement, although contact details, including an address, will continue to be required. Furthermore, the rules specify no longer to designate the contact person signing the form as the "person responsible for the filing", which could imply a certain liability of that person in the event of faulty filings. In addition, the new rules provide for a better distinction between the disclosure statement that is filed with the exchange and the issuer and the information that will be published and made available to the market.

The new rules also provide for a notification duty in the event of a change of the facts disclosed in the disclosure statement. This duty to update filings is, however, limited to certain events: changes in the name and domicile of the shareholders and/or beneficial owners, in positions in equity derivatives, in connection with securities lending as well as in the structure of indirect holdings and concerted parties.

Finally, FMIO-FINMA maintains the four-trading-day deadline to file the disclosure statement with the issuer and SIX Swiss Disclosure, but extends it to 20 trading days for notifications in connection with the death of a party.

Investigation and Enforcement

The institutional framework for investigating and enforcing the disclosure rules remains unchanged.

The Disclosure Office of SIX Swiss Exchange will continue to be responsible for monitoring compliance and will report any breach to FINMA. If, upon reviewing the matter, FINMA considers that the rules were violated, it will continue to be required to forward the case to the Federal Department of Finance, who, in turn, is responsible for formally investigating the matter and issue a fine, subject to an appeal to the Federal Criminal Court.

At the same time, the FMIA reduces the maximum fine in cases of negligence to CHF 100,000. This change should trickle down and lead to lower fines across the board. Nevertheless, the hearing materials suggest that the Disclosure Office, FINMA and the Federal Department of Finance will not change their enforcement policy and continue to apply a "zero tolerance" policy. They will continue to investigate and initiate criminal administrative proceedings even against minor breaches, although it will remain possible to settle a matter without a criminal action subject to a reparation payment.

Transition Period

The new rules will enter into effect on 1 January 2016. However, the rules provide for a transition period of three months until 31 March 2016, during which market participants can file their disclosure statements in accordance with the previous rules provided that they mention this fact in their disclosure statement.

Moreover, although existing statements remain valid as a matter of principle, a restated disclosure statement will need to be filed by 31 March 2016 if new disclosure obligations are triggered by the change of rule. Therefore, market participants should review all their positions until then and determine if they need to file a new disclosure statement.

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