

Briefing April 2017

New Rules on Disclosure of Substantial Shareholdings – Delegation of Voting Rights

On 1 March 2017, the Swiss rules on the disclosure of substantial shareholdings were amended to allow **persons and entities exercising a discretionary power to vote shares** based on delegation of voting rights either to disclose the **person effectively exercising discretion** or to aggregate and disclose the position on a **consolidated basis** at the level of the ultimate controller. The new rules provide for a transitional regime allowing shareholders to disclose their positions under the **new regime by 31 August 2017**. **Previous filings of persons exercising a discretionary power to vote shares will need to be restated** under the new rules within the same period. In contrast, persons holding directly or indirectly shares are not affected by this amendment.

A Short History of Disclosure Rules

Since 1 January 2016, the Swiss rules on the disclosure of substantial shareholdings governed by article 120 of the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 19 June 2015 (Financial Market Infrastructure Act, **FMIA**, SR 958.1) and its implementing ordinance, Ordinance of the Swiss Financial Markets Authority on Financial Market Infrastructures and Market Conduct Securities and Derivatives Trading of 3 December 2015 (**FMIO-FINMA**, SR 958.111) provide for a separate obligation to disclose substantial shareholdings for persons who effectively have the discretionary power to exercise the voting rights associated with equity securities, whenever the voting rights are not exercised directly or indirectly by the beneficial owner (article 120 (3) FMIA). This obligation applies in parallel to the

general rules, which govern the disclosure of substantial shareholdings by persons who acquire shares directly, indirectly or in a concerted action with third parties (article 120 (1) FMIA).

This obligation to disclose discretionary power to exercise voting rights was introduced in ruling to a decision of the Swiss Federal Supreme Court that the disclosure duty imposed on persons who hold shares for the account of several beneficial owners who do not disclose their shareholdings, was unconstitutional because it did not rest on a sufficient legal basis (Decision of the Swiss Federal Supreme Court 2C_98/2013 of 29 July 2013). This decision specified that indirect ownership implies holding all rights and privileges associated with ownership and can only arise when an investor enjoys, at least in principle, the possibility to benefit from both the financial and voting rights attached to shares.

Amended Disclosure Rules

Initially, when the FMIA and FMIO-FINMA were enacted, article 10 (2) FMIA-FINMA provided that the shareholdings of persons exercising a discretionary power to vote needed to be aggregated at the level of the ultimate, direct or indirect, controller. For example financial groups were not allowed to aggregate voting rights at the level of the asset management entity effectively exercising the voting rights.

While this regime was well suited to large financial groups, it created practical difficulties for privately-held groups and private banks, who advocated a change of the disclosure rules. After initially putting to consultation a disclosure regime focusing exclusively on the entity effectively exercising discretion, FINMA opted after the hearings on the **rule change to allow market participants to choose how they intend to aggregate and disclose their positions based on a discretionary power to vote shares**.

Under the new regime, the disclosure duty applies to persons effectively exercising a discretionary power to vote shares (article 10 (2), first sentence, FMIO-FINMA), e.g. an asset management entity deciding how to exercise voting rights. However, market participants can also comply with their disclosure duty by aggregating and disclosing their positions on a consolidated basis directly or indirectly by the controlling person (article 10 (2), second sentence, FMIO-FINMA), at the level of a holding company or even at the level of controlling shareholders. In both cases, the disclosure form filed with the company and the exchange will need to specify shares disclosed because of a discretionary power to exercise the voting rights, in addition to the shares held by the asset manager as beneficial owner (article 22 (a)(1) FMIO-FINMA). Furthermore, if an investor opts to disclose on a consolidated basis, the disclosure form must also expressly mention that this option was exercised (article 22 (a)(2) FMIO-FINMA). The disclosure of the positions based on their discretionary power to vote shares of their clients must be aggregated with their direct or indirect interest (i.e. proprietary positions), if any, and therefore the decision regarding consolidation or not and

also the content of the notification may require particular attention, if the controlling person holds direct interest as well.

These new rules entered into force on 1 March 2017 (article 50a FMIO-FINMA). However, market participants have until 31 August 2017 to comply with them. Effectively, all market participants having previously disclosed a position because of a discretionary power to vote shares will need to **restate their position under the new rules and chose to disclose their positions either on an entity or on a consolidated basis**. Other investors, holding their shares directly, indirectly or in a concerted action, are not affected by this amendment and do not need to restate their position.

Practical Impact for Asset Managers

As a practical matter, the new rules concern primarily asset managers. Indeed, they apply directly to asset management companies who are entrusted with exercising the **voting rights on managed accounts** or on **holdings of private investment vehicles** controlled by their clients. Asset managers will benefit from these rules as they will have the choice to either disclose the position at the level of the asset manager or aggregate them with the position of the person who ultimately controls them.

By contrast, **holdings of investment funds and other collective investment schemes** continue, as a matter of principle, to be governed by a **specific regime for the disclosure of shareholdings by collective investment schemes** (see article 18 FMIO-FINMA) allowing the fund management company to disaggregate its shareholdings from the ones of the rest of the financial group to which it belongs and disclose the positions held by all funds together as well as on an individual fund level (article 18 (2) FMIO-FINMA). Practically speaking, however, this regime is truly of interest only for Swiss fund management companies and foreign collective investment schemes that are approved for distribution in Switzerland to non-qualified investors (article 18 (1) FMIO-FINMA).

All other managers of **foreign collective investment schemes** cannot disaggregate the shareholdings of the collective investment schemes, unless the fund or the fund management company, as the case may be, evidences to the disclosure office that it is **independent** from the financial group to which it belongs (article 18 (3) FMIO-FINMA), **which is often a cumbersome process and triggers additional reporting duties to the disclosure office** (see article 18 (5) to (8) FMIO-FINMA). Moreover, in many cases, in particular, when the decision on how to exercise voting rights is exercised in a centralized manner, the **fund will not meet the independence requirements** to be disaggregated (see article 18 (5) FMIO-FINMA). Therefore, as a practical matter, the holdings of foreign collective investment schemes, where the disclosure obligation needs to be complied with by the fund management company, will continue to be aggregated with the financial group that controls them (article 18 (4) FMIO-FINMA).

In other words, this approach implies that collective investment schemes are deemed to be beneficially owned by the persons controlling the financial group to which the fund management company belongs and shareholdings of funds must be aggregated as indirect shareholding of such persons, even if they do not enjoy the financial benefit of the shareholding. To the extent a fund management company delegates the management of the portfolio including the discre-

tion to exercise the voting rights to another entity, e.g. an asset management company, the latter will also need to aggregate the position under article 120 (3) FMIA and either disclose the position at entity level or consolidate it with the position of the rest of the group and delegate it as such.

Outlook

Overall, the new rules on the disclosure of the discretionary power to exercise voting rights provide additional flexibility to persons subject to this particular disclosure obligation, in particular asset managers. Financial groups and market participants, more generally, may opt for a disclosure at an entity level or at a consolidated level depending on the complexity of their organization and the degree of autonomy of their asset management business.

However, all market participants enjoying a discretionary power to exercise voting rights should review their positions and, if they exceed a disclosure threshold, restate their filings by 31 August 2017. By contrast, other market participants holding directly, indirectly or in concerted action with third parties substantial shareholdings in equity securities subject to the Swiss disclosure rules are not affected by this amendment.

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