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Disclosure of delegated voting rights

On March 1 2017, the Swiss rules on the disclosure of substantial shareholdings were amended. As a result, persons and entities exercising a discretionary power to vote shares based on the delegation of voting rights may now disclose either the person effectively exercising discretion or the consolidated position held by the ultimate controller.

This reform corrects the rules on the disclosure of substantial shareholdings that had been in force since January 1 2016. Those rules 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 of Swiss issuers listed on a Swiss exchange, or foreign issuers that are primarily listed on a Swiss exchange, whenever the voting rights are not exercised directly or indirectly by the beneficial owner (article 120 (3) of the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of June 19 2015, Financial Market Infrastructure Act, [FMIA], SR 958.1). This obligation was introduced in response to a ruling of the Swiss Federal Supreme Court holding that a previous incarnation of this rule with a narrower focus did not rest on a sufficient statutory basis (decision of the Swiss Federal Supreme Court 2C_98/2013 of July 29 2013). This obligation applies now 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).

Amended disclosure rules

When article 120 (3) FMIA was enacted, article 10 (2) Ordinance of the Swiss Financial Markets Authority on Financial Market Infrastructures and Market Conduct Securities and Derivatives Trading of December 3 2015 (FMIO-Finma, SR 958.111) provided that the shareholdings of persons exercising a discretionary power to vote needed to be aggregated at the level of the ultimate controller. For example, financial groups were required to aggregate voting rights that were exercised by asset management entities.

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 an initial consultation suggesting a separate disclosure by the entity effectively exercising voting rights, Finma opted to allow market participants to choose how they intended to aggregate and disclose their positions.

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), for example, an asset management entity. However, market participants will also have the option to comply by aggregating and disclosing their positions on a consolidated basis at the level of the controlling person (article 10 (2), second sentence, FMIO-Finma), for example, the ultimate holding company or the controlling shareholders, if any. In all cases, the disclosure form filed with the company and the exchange will need to distinguish which shares are subject to a discretionary power to exercise the voting rights and which are beneficially owned (article 22 (a)(1) FMIO-Finma). Furthermore, if an investor opts to disclose on a consolidated basis, the disclosure form must also expressly mention this (article 22 (a)(2) FMIO-Finma).

These new rules entered into force on March 1 2017. However, market participants have until August 31 2017 to comply with them (article 50*a* FMIO-Finma). 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 are not affected by this amendment and do not need to restate their position.

Practical impact for asset managers

The new rules will concern primarily asset managers who can exercise the voting rights of shares held through managed accounts or private investment vehicles controlled by their clients. Asset managers will benefit from these rules as they will have the choice to 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, as a matter of principle, continue to be governed by a specific regime for the disclosure of shareholdings by collective investment schemes (see article 18 FMIO-Finma), which is not affected by this amendment. However, to the extent a fund management company delegates the management of the portfolio including the discretion to exercise the voting rights to another entity, for example, 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 provide additional flexibility to persons subject to the obligation to disclose a discretionary power to exercise voting rights, in particular asset managers. 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 August 31 2017. By contrast, other market participants subject to the Swiss disclosure rules are not affected by this amendment.

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