Federal Council proposal for amendments to the Financial Market Infrastructure Act

19.08.2024

On 19 June 2024, the Federal Council began consultations on proposed amendments to the FinMIA intending to further enhance the competitiveness of the Swiss financial center and the stability of the financial system.

Key takeaways

- **Both for the regulations on the disclosure of shareholdings and for the obligation to report transactions in shares of listed companies subject to a public takeover offer, the starting point of the reporting obligation is to be raised from 3% to 5% of the voting rights.**
- **To avoid petty offenses under disclosure law, the disclosure offices should give those responsible an opportunity to take corrective actions if breaches of reporting obligations arise. If a serious breach is suspected, the disclosure offices should inform the competent prosecution authority and FINMA directly.**
- **The regulations on the disclosure of management transactions and ad hoc publicity will be transferred from the Listing Rules to the FinMIA.**
- **Listed companies and their advisors are to be required to maintain insider lists.**
- **In the area of derivatives trading, simplifications are to be provided for small non-financial counterparties.**

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Introduction

On 19 June 2024, the Federal Council opened the consultation on the proposed amendments to the FinMIA. The law's revision proposed by the Federal Council is intended to adapt the FinMIA to technological and international developments to improve the competition of the Swiss financial center and the stability of the financial system. This Legal Update presents the most important proposed changes here in the areas of disclosure law, takeover law, management transactions, insider trading, market manipulation, ad hoc publicity and derivatives trading. Changes are also planned in the area of financial market infrastructures, but these, however, are not covered in this Legal Update.

Main proposed amendments to the Financial Market Infrastructure Act

Disclosure of shareholdings

The reporting obligation to disclose shareholdings in listed companies, pursuant to Art. 120 et seq. FinMIA, is to be amended so that the current lowest threshold of 3% is to be raised to 5% of voting rights. The Federal Council justifies this proposal with proportionality and the need for alignment with international standards (e.g., minimum threshold of 5% in the USA and in most EU member states). The disclosure obligation must now also cover equity securities listed on DLT trading systems.

In addition, possible violations of the reporting obligation are to be described by law to avoid petty offenses, under disclosure law. Here, the disclosure offices of the stock exchanges are to give those responsible a possibility of correction if breaches of the reporting obligation occur, meaning that criminal liability must only apply with serious breaches. If such a serious breach is suspected, the disclosure offices must inform the competent prosecution authority and FINMA directly.

In the future, foreign shareholders holding voting rights of at least 10% in listed companies will have to designate a Swiss domicile for service of process.

Takeover law

From the time of the launch of the takeover offer, the transaction reporting obligation, pursuant to Art. 134 FinMIA, which governs the reporting of transactions in shares of the target company during the offer period, will become relevant. In line with the changed threshold in disclosure law, the transaction reporting obligation will now also only apply to shareholders with at least 5% of the voting rights.

In accordance with the proposed amendment to the threshold value of the notification obligation, shareholders should now only be able to obtain party status in takeover proceedings if they hold at least 5% and not just 3% of the voting rights.

Management transactions and ad hoc publicity

Currently, disclosing management transactions and the obligation to publish price-sensitive facts (ad hoc publicity) are primarily governed by the Listing Rules of the Swiss Stock Exchange (SIX Swiss Exchange) and the Berne Stock Exchange (BX Swiss). To ensure uniform regulation, the corresponding provisions are to be placed in law in the FinMIA and the implementing ordinances. Except for minor adjustments, the main features are to be adopted by the SIX Listing Rules and the SIX Directives on Management Transactions (DMT) and Ad hoc Publicity (DAH)

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Previously, the name and business function of the person subject to the reporting obligation were omitted from the publication. To promote transparency, this information must now be published. In addition, the Federal Council should be able to determine black-out periods in line with European law.

Under the current Listing Rules, the Swiss Stock Exchange can impose a fine for breaches of the regulations on management transactions and ad hoc publicity (up to CHF 1 million for negligence and up to CHF 10 million for intent). These fines are to be regulated in a new criminal offense in the FinMIA. The maximum fine is to be significantly lower in the future (up to CHF 100,000 for negligence and up to CHF 500,000 for intent). Under supervisory law, FINMA should now be able to initiate enforcement proceedings against the issuer if they so deem violations of the regulations.

Insider trading

Currently, there is no explicit obligation for issuers to keep insider lists (i.e., information on the time when the insider information arose and the persons who have knowledge of the insider information), but this does not prevent many listed companies from keeping these lists. A new standard is to be created in the FinMIA that explicitly imposes an obligation on listed companies and their agents to keep these lists and to retain them for 15 years and, if necessary, to hand them over to FINMA and the relevant prosecution authorities. Details regarding the material structure and exceptions to keep such lists are to be set forth by the Federal Council.

A breach of the corresponding new explicitly defined obligations is to be punished with a fine (up to CHF 100,000 for negligence and up to CHF 500,000 for intent).

Regarding the other legal provisions on insider trading, the tertiary insider should be abolished, and the offender category of secondary insider should now include all persons who are not considered primary insiders. Similarly, the qualifying offense of insider trading and market manipulation should no longer require a pecuniary advantage of CHF 1 million to be achieved but should apply in an amount of CHF 500,000.

Derivatives trading

Since introducing the obligation to report derivatives transactions to a trade repository, various international standards have evolved. Thus, changes to the content of these reports are planned at ordinance level to align Swiss regulation with international standards. Furthermore, foreign financial market supervisory authorities should now benefit from easier access to the Swiss trade repository. Also, the revised law would provide for simplifications for small non-financial counterparties. In addition, the calculation methods used for qualification as a small non-financial or small financial counterparty (in line with European regulation in accordance with EMIR-REFIT) are to be simplified and standardized.

Outlook

The Federal Council's proposed revision of the Financial Market Infrastructure Act would result in numerous changes in the areas of financial market infrastructures, disclosure law, takeover law, management transactions, insider trading, ad hoc publicity and derivatives trading. These changes affect issuers and their investors in particular.

The consultation on the draft law will last until 11 October 2024, after which the Federal Council will decide on the draft law for the attention of Parliament.

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No legal or tax advice

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