Modified reporting requirements for shareholdings in listed Swiss shares

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1. Introduction

According to the amended provisions in the FINMA Ordinance on Financial Markets Infrastructures (FMIO-FINMA), in constellations of direct or indirect control, now the person who decides how voting rights are exercised is subject to the notification obligation. Thus, it is no longer the person ultimately in control (who may – nonetheless – continue to comply with the notification obligation on a consolidated basis for all the entities it controls).

Qualified shareholders of listed companies must give notification when they reach, fall below or exceed certain voting rights thresholds, whether exercisable or not.

This notification obligation is regulated in art. 120 (1) of the Financial Markets Infrastructure Act (FMIA), in force as of 1 January 2016. Newly introduced with the FMIA was – next to the notification obligation of the equity securities' beneficial owner – the notification obligation of any third parties having discretionary power to exercise the voting rights associated with such equity securities (art. 120 (3) FMIA). This is the case when the beneficial owner of the equity securities authorizes, on its own discretion, an asset manager to exercise the voting rights attached to the participation rights.

This separate notification obligation, with the third party having discretion to exercise the voting rights, is further regulated in art. 10 (2) FMIO-FINMA. According to the old version of this provision, the legal entities directly or indirectly controlling the voting rights were deemed to have discretionary power to exercise those rights. Therefore, prior to 1 March 2016, in group constellations, the last member of the chain of control was subject to the notification obligation.

In practice, however, implementing this third party notification obligation proved problematic. Parties directly affected by the regulation pointed out these difficulties, which prompted FINMA to attend to those issues.

The amendment enters into force on 1 March 2017, and the new requirements must be complied with by 31 August 2017. During the transitional period, notifications can be made in accordance with the previous provisions, as well as the amended provisions. However, at the

expiry of the transitional period, all notifications which refer to a circumstance that creates an obligation duty according to Art. 120 para. 3 FMIA at that time must be reported according to the amended provisions. Any notification which was conducted according to the previous provisions before the changes entered into force as of 1 March 2017, must be reported again according to the amended provisions by the end of the transitional period. Likewise, any reporting which has been conducted during the transitional period according to the previous provisions must be conducted again according to the revised provisions by the end of the transitional period.

2. Legal Challenges

The old approach was, in itself, impractical. The notification obligation often affects controlling shareholders with no direct involvement in the exercise of the voting rights. Such shareholders have neither control over nor direct knowledge of the relevant investment positions.

When the last member in the chain of control exercises a notification obligation, excessive costs or confidentiality issues too often arise. Also troubling is that the effort can be daunting for natural persons who control financial groups but who do not carry out any operational activities themselves.

The disclosures may potentially be misleading to market participants because they create an impression that the notifying shareholders, those who control asset managers, are involved in deciding how the voting rights are exercised on behalf of those asset managers' clients.

It was also repeatedly pointed out that the old provision (art. 10(2)) contradicts the statutory provision of art. 120 (3) FMIA. This provision required notification from "anyone who has the discretionary power to exercise the voting rights associated with [the relevant positions]".

The old art. 10 (2) FMIO-FINMA, however, by imposing the disclosure obligation not on the person effectively exercising the voting rights, but rather on the person ultimately controlling the person having voting discretion, went well beyond the statutory requirement.

3. New Rules

Instead of a notification obligation of the person ultimately in control of the one having discretion to exercise the voting rights, the new art. 10 (2) FMIO-FINMA now allocates the obligation of notification directly to the person having discretionary power, i.e., the one who effectively decides.

Before the amendment, the notification obligation rested with the entities directly or indirectly controlling the asset manager. Now, however, the amendment directly affects the asset manager who effectively decides on the exercise of the voting rights. This change prompts the necessity of new systems and processes being implemented in order to comply with the new rules. In particular, who effectively has discretion to exercise the voting rights must be determined.

Discretion is given when the controlling entity issues no instructions, leaving the concerned party free to decide independently on how to exercise the voting rights. Thus, the notification obligation does not always necessarily rest with the person to whom the voting rights are formally delegated, but with a directly or indirectly controlling entity, if that controlling entity so instructs.

Alternatively, if the person with discretion to exercise the voting rights is directly or indirectly controlled, the new provision allows for notification by the controlling entity. In other words, although the obligation for notification primarily rests with the entity who effectively decides on the exercise of the voting rights, the person ultimately in control may fulfill the notification obligation for all its controlled entities collectively. Here, the last member in the chain of control carries out the disclosure for all entities directly or indirectly controlled collectively. From the first consolidated notification onwards, the controlling entity becomes responsible for notification, while the controlled entities are free from the notification obligation. The controlling entity must then comply with the disclosure requirements on a consolidated basis i.e., the thresholds relevant for notification are determined on a consolidated basis. Relating to consolidation, the amended art. 22 (2) (a) FMIO-FINMA requires that the consolidation be expressly mentioned in the notification.

In group companies, the alternative to consolidated notification, via the legal or natural person ultimately controlling the asset managers, may smooth the way to the new system because, under the current regime, the notification obligation already rests with the controlling entity. When choosing this option, however, there might well be constellations where, with a consolidated notification, certain transactions will need to be notified. These transactions would not require notification if the disclosure obligation remained with the controlled asset managers individually because the thresholds triggering the notification obligation may not be reached individually, but collectively. Even so, the notifications will still need to be amended to specifically indicate that the notification is done on a consolidated basis for all entities controlled.

4. Practical Aspects for Investors and Issuers at SIX Swiss Exchange

The forms for investors' disclosure notifications provided by the SIX Disclosure Office have also been adapted in view of the above mentioned changes and the revised forms are available on the SIX Exchange Regulation website.

In the case of reporting in accordance with Art. 120 para. 3 FMIA (i.e., discretionary exercise of voting rights), the person subject to the reporting obligation needs to indicate in the form whether the notification is being made by the person who decides how voting rights are exercised or on a consolidated basis. Further, the electronic reporting platform has been adapted such that issuers are able to indicate that the notification has been made on a consolidated basis. In published notifications, such notice appears only if reporting is conducted on a consolidated basis. The reporting process otherwise remains unchanged.

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