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Revised provisions on ad hoc publicity and corporate governance

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On 1 July 2021, revised provisions regarding ad hoc publicity and corporate governance will come into force as a result of changes to the corresponding SIX Swiss Exchange regulations. The revision aligns the ad hoc publicity rules to insider trading rules. It also brings about changes of practical relevance for issuers of equity and debt securities listed on the SIX Swiss Exchange. However, the cornerstones of ad hoc publicity remain unchanged.

Key takeaways

- **Abolishment of 'per se' price-sensitive facts, with the exception of financial reports**
- **New duty to 'flag' facts sensitive to stock price is introduced pursuant to art. 53 of the SIX Listing Rules**
- **Issuers are required to implement adequate internal rules or processes for postponement of disclosure to ensure confidentiality**
- **As of 1 October 2021, issuers of primary-listed securities are obliged to file ad hoc releases exclusively with Connexor Reporting**
- **New duty to disclose general blackout periods in the Corporate Governance Report**

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Abolishment of ‘per se’ price-sensitive facts regarding ad hoc publicity

The SIX rules on ad hoc publicity qualifies certain facts under the existing ad hoc provisions as potentially price-sensitive, irrespective of the individual case and without explicit statutory grounds. With the exception of annual and interim reports, the revised rules now clarify that there are no ‘per se’ relevant facts and that the issuer must determine the relevance of facts and developments on the grounds of each individual case. There is also no percentage threshold. Thus, issuers have greater discretion in deciding whether a fact is qualified as price-sensitive.

Most notably, under the revised rules, not all changes regarding the board of directors and the management are deemed ‘per se’ relevant and are therefore no longer to be automatically reported. Consequently, this change will lead to a significant simplification with regard to changes in personnel. As a mere linguistic adjustment, art. 53 para. 1 Listing Rules (LR) now refers to a ‘price-sensitive fact’ and no longer to a ‘potentially price-sensitive fact’. Under the new regulations, it must be assessed on a case-by-case basis prior to disclosure, if it is relevant to the market prices. This assessment must be made taking into account a ‘reasonable market participant’: a rationally acting person familiar with the activity of the issuer and the market of the specific financial instrument, but who is not a professional investor. Previously, reference was made to the ‘average market participant’. Already, most announcements make reference to reasonable investors. With the new terminology, the rules are aligned to international rules and Swiss insider trading regulations.

Flagging obligation for ad hoc announcements

Under the revised rules, and in line with the regulations of several other European countries, price-sensitive facts must be reported as ‘ad hoc announcement pursuant to art. 53 para 2bis LR’ (flagging). The classification of pure marketing messages as ad hoc announcements is not permitted and may be sanctioned. However, the SIX ad hoc regulations allow more flexibility compared to the EU Market Abuse Regulation (MAR), as an ad hoc announcement can include both marketing news and price-sensitive facts. Additionally, such ad hoc announcements must be published chronologically in a separate register on the issuer's website, indicating the publication date. The ad hoc announcements must remain available for at least 3 years instead of 2 years under the current rules. The information on the issuer’s website should be easy to find (e.g. through a filtering tool or a separate webpage).

Requirement of adequate internal rules or processes for postponement of disclosure

Disclosure of a price-sensitive fact can be postponed if the fact is based on a plan or decision of the issuer (e.g. an on-going or planned M&A transaction) and if disclosure could prejudice the issuer's legitimate interests. As a new requirement for the postponement of disclosure of facts sensitive to stock price, the issuer must provide for adequate internal rules or processes, by which sensitive facts remain confidential and are disclosed only to personnel requiring such facts to perform the tasks assigned to them. To ensure confidentiality of insider lists, information barriers or other technical measures could be used. Particularly, the issuer will be obliged to put in place organisational measures guaranteeing disclosure of confidential facts on a need-to-know basis only. Given that issuers are facing similar obligations already pursuant to the laws on insider trading, these changes can be expected to be implemented in practice fairly easily. With these new requirements risks of leaks and insider trading should be minimised to a great extent.

Reporting exclusively via Connexor Reporting

With regard to the reporting of price-sensitive facts to SIX Exchange Regulation, the Issuers Committee of the Regulatory Board has also resolved that issuers of primary-listed equity securities must in future use the online platform Connexor Reporting exclusively for the transmission of ad hoc announcements, pursuant to the revised Art. 12a DAH and individual amendments to the DRPRO (Directive on the Use of the Electronic Reporting Platform to Fulfil Reporting Obligations under Art. 9 of the Directive on Regular Reporting Obligations), scheduled to come into force on 1 October 2021. Other issuers, e.g. issuers of derivatives, bonds, collective investment schemes and other listed securities, can continue to send ad hoc announcements to SIX Exchange Regulation via e-mail.

Disclosure of general trading blackout periods in the corporate governance report

The new rules require that information on the "general blackout periods" must be provided for in the corporate governance report. General blackout periods are fixed periods prior to publication of financial results and thus stay the same over the years. According to the revised SIX Directive on Information Relating to Corporate Governance, the deadlines, the addressees (e.g. individuals not allowed to trade), the scope of the restrictions and any exceptions to the trading blackout periods must be disclosed. Trading blackout periods imposed in individual cases (so-called ‘special blackout periods’), e.g. in the event of a postponement of disclosure, do not have to be published accordingly.

Consequences for issuers

Affected issuers should be aware that as of 1 July 2021 the decision on price-sensitivity must always be made on a case-by-case basis with the exception of annual and interim reports, which remain a per se price-sensitive fact. Additionally, the issuers must explicitly flag ‘ad hoc announcements’ pursuant to art. 53 LR. Furthermore, the issuer’s website has to list the ad hoc announcements separately and keep them for three years. General blackout periods have to be disclosed in the corporate governance report. From 1 October 2021 onwards, Connexor Reporting is mandatory for the submission of ad hoc announcements to SIX, but only for issuers of primary-listed equity securities. If not already in place, it is advisable to introduce adequate internal rules or processes for postponement of disclosure to ensure confidentiality.

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No legal or tax advice

This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal or tax advice. If you have any questions relating to this legal update or would like to have advice concerning your particular circumstances, please get in touch with your contact at Pestalozzi Attorneys at Law Ltd. or one of the contact persons mentioned in this Legal Update.

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