New disclosure requirements for significant shareholding in listed companies

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Introduction

In the aftermath of the global financial crisis and following the general trend in financial regulations, the Federal Parliament adopted the Financial Markets Infrastructure Act on June 19 2015. It contains a body of rules aimed at ensuring:

- the proper functioning and transparency of securities and derivatives markets;
- the stability of the financial system; and
- the protection of financial market participants and equal treatment of investors.

The new disclosure requirements for significant shareholding laid down in the act, as well as the Financial Market Infrastructure Ordinance issued by the Financial Market Supervisory Authority (FINMA), relate more particularly to the transparency of the securities market. The act and the ordinance both entered into force on January 1 2016.

As in the past, disclosure requirements are triggered by the acquisition or disposal of shares or equity-related derivatives of:

- companies with their registered office in Switzerland, whose equity securities are listed in whole or in part in Switzerland; and
- companies with their registered office abroad, whose equity securities are mainly listed in whole or in part in Switzerland.

The relevant thresholds of the voting rights, whether exercisable or not, remain at 3%, 5%, 10%, 15%, 20%, 25%, 33.3%, 50% or 66.6%. Reporting is to be made with the relevant issuer and the exchange on which the relevant interests are traded (the SIX Swiss Exchange and the BX Berne Exchange). However, the new rules and regulations bring major changes, notably by redefining the scope of the persons subject to reporting obligations.

Key changes

According to both the act and the ordinance, the reporting obligation lies not only with the beneficial owner of the shares or rights, but also with the person who may exercise voting rights in shares at its sole discretion.

A 'beneficial owner' is defined as the person who controls the voting rights and bears the economic risk of the relevant shareholding. The fact that the beneficial owner does not exercise his or her voting rights itself is irrelevant. As a result, the beneficial owner is subject to disclosure obligations, regardless of whether he or she has authorised a third party (eg, an asset manager) to exercise the voting rights.

The person authorised to exercise the voting rights at its sole discretion refers to the individual or entity which, while not being a beneficial owner, is authorised to vote the shares at its discretion, regardless of whether such authorisation may be revoked at any time. The subjection of voting rights holders to disclosure requirements corresponds in a way to a former regulatory requirement which had been invalidated on a technical ground by the Federal Supreme Court in 2013.

The main changes deriving from the introduction of these new concepts and their implementation in the ordinance modify the shareholding disclosure regime in several respects. The key changes can be summarised as follows.

Managed holdings

Assets managers (eg, fund management companies and asset managers investing through managed accounts) may qualify as voting rights holders if they are in a position to exercise voting rights at their sole discretion. In such an event, asset managers will assess whether a shareholding threshold has been crossed by aggregating their own holdings with the holdings managed for the account of third parties. As a practical matter, asset managers may seek to limit the consequences of the new regulations by amending their contractual provisions governing the exercise of voting rights attached to shares invested on behalf of their clients.

Holdings of usufructuaries and bare owners

Usufructuaries may qualify as voting rights holders depending on whether they are in a position to exercise the voting rights at their sole discretion. Bare owners, who were until recently exempt from disclosure requirements, qualify in principle as beneficial owners and are thus required to report any disclosable interest.

Holdings of group companies

Under the new regime, only the direct shareholder and top holding company (or, as the case may be, the ultimate controlling shareholder) are subject to a reporting obligation. The entire holding chain no longer needs to be set out in detail. Further, group companies are no longer deemed to be 'acting in concert' and therefore subject to the disclosure requirement on these grounds. For shares and equity-related securities that are traded on the SIX Swiss Exchange, a notification by the group shall be made in accordance with Form II, which is available on the Disclosure Office website.

Holdings acquired by inheritance

Acquisition of holdings by inheritance remains subject to reporting requirements. However, the period during which heirs must report their acquisition has been extended from four to 20 trading days.

Securities settlement

Banks and securities dealers continue to benefit from the exemption applicable to trading book and securities lending and securities settlement. Under the former regime, such exemption applied provided that the holding period did not exceed three trading days. As a result of the move to a T+2 settlement cycle, the maximum holding period under the new regime has been shortened to two trading days.

Securities lending, repo transactions and shares transfers for security purposes

Contrary to what had been initially envisaged, the rules relating to securities lending and repo transactions, as well as shares transfers for security purposes, remain unchanged. As a result, each party to the relevant transaction continues to be subject to disclosure requirements.

Holdings of Swiss and foreign collective investment schemes

The previous regime remains essentially unchanged. Collective investment schemes are deemed the beneficial owners of the holdings of the fund, not the fund investors. For shares and equity-related securities that are traded on the SIX Swiss Exchange, a notification will be made in accordance with Form III.

As regards Swiss collective investment schemes and foreign collective investment schemes that are licensed for distribution in Switzerland, the disclosure obligations lie with the licence holder (ie, the fund management company of contractual funds or externally managed *société d'investissement à capital variable* (SICAV), self-managed SICAV, the limited partnership for collective investment

schemes and *société d'investissement à capital fixe* (SICAF)).

With respect to foreign collective investment schemes that are not licensed for distribution in Switzerland, the disclosure obligation is incumbent on the fund administration or, as the case may be, the investment company, provided that the foreign collective investment schemes may show that it is independent from the group to which it belongs, in view of the personal and organisational criteria laid down in the ordinance. Absent such demonstration, the reporting obligation lies with the relevant group parent or its controlling shareholders, if any.

Incidentally, where the assets of a collective investment scheme are managed by a fund management company which may freely direct the exercise of voting rights, the fund management company will aggregate the holdings managed on behalf of the relevant collective investment scheme with its own holdings in order to determine whether it qualifies as a voting rights holder subject to parallel reporting requirements.

Share buybacks

Under the former regime, buyback programmes were exempted by the Takeover Board from ordinary disclosure requirements. Such exemptions no longer apply with the new rules and regulations under which share buyback programmes remain subject to the ordinary reporting requirements, in addition to those applicable to public equity share buybacks.

Transitional period

The act and the ordinance are effective from January 1 2016, subject to certain transitional rules. Any reporting made on or before December 31 2015 remains valid, subject to the following:

- With respect to any fact that occurred before January 1 2016 and must be reported according to the act and the ordinance (in particular, the ability to exercise voting rights on a discretionary basis), the relevant reporting must be made by March 31 2016.
- With respect to any fact that occurred on or after January 1 2016 and must be reported according to the act and the ordinance, the relevant reporting should, in principle, be made in accordance with the new rules and regulations. However, the person or entity subject to the reporting requirement may elect to file a (tentative) notification as per the previous regime until March 31 2016, provided that:
    - the notification states explicitly that the reporting is made in accordance with the former rules and regulations; and
    - such filing be supplemented by March 31 2016 with an additional notification in a form and substance compliant with the new requirements.

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