

# Proposed amendment to reporting obligation for significant shareholding in listed companies

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## Introduction

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## Introduction

The disclosure requirements for significant shareholding in listed companies are governed by the Financial Markets Infrastructure Act and its implementing ordinance, the Financial Market Supervisory Authority (FINMA) Financial Market Infrastructure Ordinance that entered into force on January 1 2016 (for further details please see "[New disclosure requirements for significant shareholding in listed companies](#)").

On August 22 2016 FINMA opened a consultation process (that ended on October 3 2016) in relation to a proposed amendment to the ordinance. The contemplated amendment relates to reporting obligations of disclosable interests held for the account of third parties by persons entrusted with discretionary voting powers.

## Existing rules

Under the existing rules, assets managers (eg, fund management companies and asset managers investing through managed accounts and other financial institutions, such as banks) 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 must assess whether a shareholding threshold has been crossed by aggregating their own holdings with the holdings managed for the account of third parties. The obligation to report such managed holdings coexists with the reporting obligation of the beneficial owner.

The particularity of the existing regime is that the reporting obligation lies at the level of the individuals who directly or indirectly control the asset manager organised as a legal entity<sup>(1)</sup> and not at the level of the management company itself. This specificity results from a request expressed by certain market participants in the first consultation process of the ordinance that ran from August 20 2015 to October 2 2015, calling for a 'last link in the chain' approach.<sup>(2)</sup> As a result, where a management company is entrusted with discretionary authority to exercise voting rights and is directly or indirectly controlled by one or several natural persons, such persons are automatically subject to a reporting obligation, regardless of whether they actually intend to interfere with the management company in the exercise of its voting rights.<sup>(3)</sup>

As a practical matter, this regime proves problematic for market participants controlled by natural persons who carry out no operational activity.<sup>(4)</sup>

## Proposed amendment

FINMA proposes to come back to the disclosure regime that it had initially envisaged with respect to the disclosure obligations of third parties<sup>(5)</sup> by centralising the burden of such obligations on the

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entity that has discretionary authority to exercise the voting rights of the disclosable interests. This means that the reporting obligation should rest with the management company, rather than its ultimate controlling individual,(6) provided that:

- the management company may freely decide how to exercise such powers; and
- the controlling person may not influence the management company on how to exercise its voting powers.(7)

Market participants had until October 3 2016 to comment on the proposed amendment. FINMA appears unwilling to follow the approach consisting of shifting the reporting obligation at the group level.(8)

### **Entry into force and transitional rules**

The proposed amendment is expected to enter into force in the first quarter of 2017 (February 1 2017 under the draft amendment to the ordinance).

A three-month transitional period is envisaged (running until April 30 2017 under the draft amendment). Until the penultimate day of the transitional period, the reporting of disclosable interests could be made in accordance with the existing regime or with the new provisions of the ordinance.(9)

Moreover, market participants should ensure by the end of the transitional period that previous reporting complies with the new rules and amend their existing disclosures accordingly, even if no transaction has been carried out in the meantime.(10)

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### **Endnotes**

(1) Article 10(2), 3rd sentence of the FINMA Infrastructure Ordinance.

(2) FINMA Report, December 9 2015, regarding the results of the consultation process relating to the FINMA Market Infrastructure Ordinance, pages 21 to 23.

(3) FINMA Explanatory Report, August 22 2016, relating to the revision of the FINMA Infrastructure Market Act, page 2.

(4) *Id.*, page 4; see also SIX Exchange Ltd, media release, September 8 2016.

(5) FINMA Explanatory Report, August 20 2015, relating to the FINMA Infrastructure Market Act, pages 26 and 27.

(6) The contemplated change would be implemented by deleting the third sentence of Article 10(2) of the ordinance. See Draft Amendment to the FINMA Market Infrastructure Ordinance, *ad* Article 10(2).

(7) FINMA Explanatory Report, *supra* note 3, page 4.

(8) *Id.*, page 4.

(9) Article 50a of the Draft Amendment to the FINMA Market Infrastructure Ordinance. See also FINMA explanatory report, *supra* note 3, page 5.

(10) FINMA Explanatory Report, *supra* note 3, page 5.

