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# Update

## Newsflash December 2015

# New Swiss rules on disclosure of significant interests in listed companies

- **New disclosure obligation for asset managers**
- **New definition of beneficial ownership**
- **New presentation of the information to be disclosed**
- **The new rules become effective on 1 January 2016**
- **The deadline to make the disclosures required under the new rules expires on 31 March 2016**

**On 9 December 2015, FINMA published its new Ordinance on Financial Market Infrastructure (FMIO-FINMA). These regulations implement the new rules on disclosure of significant interests in listed companies, which the Swiss Parliament adopted in June 2015, and which will become effective on 1 January 2016. The new rules include welcome simplifications to the Swiss disclosure regime. However, they also impose important new obligations, in particular on asset managers.**

On 19 June 2015, the Swiss Parliament adopted the new federal act on "Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading" (FMIA). The new law establishes the regulatory regime applicable to key market infrastructures, such as securities exchanges, trading platforms, central depositaries and payment systems. Trading in derivatives is also regulated. FMIA further incorporates the rules of the Stock Exchange Act on public takeovers and disclosure of significant interests in listed companies.

On 9 December 2015, FINMA published the ordinance (FMIO-FINMA) that implements – among other things – the new rules on disclosure of significant interests in listed companies. In most respects, the new law and the ordinance restate the current regulations. They also, however, introduce some significant changes that can result in the owners of significant interests in companies listed in Switzerland or in the firms managing such interests having to make certain disclosures.

**New disclosure obligations for asset managers**

One of the key purposes of the revision was to require asset managers to disclose the positions that they hold for the account of their clients. In a decision of 2013 (2C_98/2013), the Swiss Supreme Court considered that the FINMA regulations on this topic lacked a statutory basis and were consequently not enforceable. The Swiss Parliament saw the adoption of FMIA as an opportunity to remedy this situation.

As a result, the new rules distinguish the disclosure obligations of the persons who beneficially own a disclosable interest in a listed company, on the one hand, and of the persons who "have the discretionary power to exercise the voting rights" (*i.e.* generally asset managers), on the other hand. The disclosure obligations of the beneficial owners and of the asset managers are separate and independent from one another. Certain shareholdings may consequently have to be reported twice: once by its beneficial owner, and once by the manager of the relevant portfolio. To avoid the confusion that could otherwise result from this "double counting", the new rules require that the person reporting specifies whether the positions disclosed are held in a capacity as a beneficial owner or as an asset manager.

In this respect, the final version of FMIO-FINMA contains a significant change compared to the version on which FINMA had initially consulted. While the draft ordinance provided that the disclosure obligation of an asset manager rests with the person who has the power to exercise the voting rights (*i.e.* on the asset manager itself), the final rules put this obligation on the person who controls the asset manager. This change is significant, in particular for financial groups where asset management mandates are generally granted to subsidiaries rather than to the parent company.

**New definition of beneficial ownership**

Under the new rules, the creation of a separate disclosure obligation for the persons who have the discretionary power to exercise the voting rights comes together with a new definition of beneficial ownership. In the past, the recognition as a beneficial owner of a disclosable interest depended exclusively on the ability to control the exercise of voting rights. Under the new rules, the beneficial owner is defined as a person who has both a voting power and bears the economic risk of the relevant shareholding.

The new rules may result in certain persons who were not recognized as beneficial owners in the past being granted this capacity as from 1 January 2016. Conversely, some persons who were deemed to beneficially own certain disclosable interests under the current rules may no longer be recognized as beneficial owners in the future.

For example, under the new rules, the usufructuaries of disclosable interests will be required to report as persons having the discretionary power to exercise voting rights, but no longer in a capacity as beneficial owners. The bare owners of the positions – who were until now exempted from any disclosure obligation – will on their side be required to report the relevant interests as beneficial owners.

The new definition of beneficial ownership may trigger an obligation to make new filings, in particular for structures that dissociate voting power from economic interests such as trusts. However, the significance of the change is reduced by the fact that most instances of dismemberment of ownership – *i.e.* securities lending and collective investment schemes – are governed by specific rules.

**Securities lending and collective investment schemes**

The new regime includes special rules for securities lending and collective investment schemes (funds).

For what regards securities lending, FINMA abandoned the regime that it had envisaged, and instead restated the current rules, where both the lender and the borrower are deemed to beneficially own the relevant securities, and must as a result take these securities into account to assess whether they have reached or crossed a disclosure threshold.

For what pertains to funds, FINMA has confirmed the current regime that applies to collective investment schemes that are authorized for public distribution in Switzerland. These funds are deemed to beneficially own the positions that they hold. Their disclosable interests must be aggregated at the level of the fund management company (but not at the level of the financial group that controls the fund management company), for each single fund and for each segment of each relevant fund.

FINMA has also introduced new provisions for funds that are not authorized for public distribution in Switzerland. These new rules are of significant practical relevance, since they apply to most funds worldwide (to the extent that they hold disclosable interests in companies listed in Switzerland) and in particular to hedge funds. These rules distinguish funds that are sponsored by a financial group and

"independent" funds. Disclosable interests held by sponsored funds must be aggregated with those of their "sponsor" financial group. Disclosable interests held by independent funds must be treated pursuant to the same principles for funds authorized for distribution in Switzerland. However, the independence criteria imposed by the rules are so strict that only few funds will likely fall into this category.

**Other changes to the Swiss disclosure regime**

The new rules include new changes to the current disclosure regime, some of which are welcome. In particular:

- Where a disclosable interest is held through a corporate body or another structure, the new rules only require the identification of the beneficial owner and of the direct (legal) owner of the relevant positions. A description of the full chain of ownership between the beneficial owner and the direct holder is no longer required.

- Disclosable interests held by a group of companies are deemed to be held indirectly by the group's parent company (or by the person who controls such parent company, if any). The companies of the group are no longer deemed to be acting in concert.

- In the event of the death of a shareholder, the heirs have now 20 trading days to report their shareholding (and no longer 4 trading days as is currently the case).

- The postponement of the duty to notify changes in significant shareholdings during a takeover period – which currently only benefits the bidder and the persons acting in concert with him – is newly extended to the other persons required to report their trades during the offer period, *i.e.* the target and the persons holding 3% or more of the voting rights in that company.

- The circumstances under which a notice of significant shareholding must be updated are now specified. The general rule pursuant to which "any change" to the disclosed information had to be notified within 4 trading days has been abandoned.

**Transition period**

FMIO-FINMA stipulates that notices of significant interests made prior to the entry into effect of the new rules remain valid until a new disclosure threshold has been reached or crossed. Notices that include information that is no longer required (*e.g.* information regarding the chain of ownership between the direct holder of the positions and their beneficial owner) consequently do not need to be immediately amended.

Notices that have to be filed as a result of the entry into force of the new rules (*e.g.* the disclosure of the disclosable interests held by asset managers) have to be made by **31 March 2016**. Notices relating to circumstances having occurred as from 1 January 2016 can be filed pursuant to the old regime until 31 March 2016, under the condition that a specific reference is made in the notice to that effect. As from 1 April 2016, all notices will have to be made pursuant to the new rules.

**Please do not hesitate to contact us in case of any questions.**

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