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Update

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Proposed changes to the Swiss rules on disclosure of significant interests in listed companies

- **FINMA consults until 3 October 2016 on a proposed change to the rules regarding the aggregation of disclosable interests held for the account of third parties**
- **Positions held for the account of third parties to be aggregated at the level of the person to whom a discretionary authority to exercise voting rights has been delegated (typically an asset manager) and no longer at the level of the person who controls the relevant asset manager**
- **Entry into force of the new rules expected for early 2017, with a transition period of three months to amend prior disclosures**

On 22 August 2016, FINMA consulted on a proposed revision of its Ordinance on Financial Market Infrastructure (FMIO-FINMA). FINMA's proposal would put an end to an aggregation regime that has turned out to be impractical for many privately-held banks and assets managers to whom a discretionary authority to exercise voting rights in a company listed in Switzerland has been delegated. It, however, raises questions that would be worth clarifying during the consultation process.

Both the Financial Market Infrastructure Act (FMIA) and its implementing ordinances (including the FMIO-FINMA) entered into force on 1 January 2016.

Amongst other changes, the FMIA introduced an explicit statutory basis for the obligations imposed on investors (typically asset managers) to aggregate disclosable interests held for the account of third parties (typically managed clients) in listed companies and with respect to which they have a "discretionary authority to exercise voting rights" (Art. 120 para. 3 FMIA).

When it first consulted on its proposed FMIO-FINMA during the summer of 2015, FINMA initially proposed a regime where the duty to disclose positions held for the account of third parties would rest with the person to whom the discretionary authority to exercise the corresponding voting rights had been delegated (typically the relevant asset manager). However, during the consultation process, market participants indicated that, where the relevant asset manager is part of a financial group, disclosable interests should be aggregated and disclosed at the level of the group's parent company, rather than at the level of each

individual asset manager (which could be a subsidiary of the relevant financial group).

As a result of these remarks, FINMA adopted final rules where the duty to aggregate and disclose client positions rests on the person who had the ultimate control over the relevant asset manager. This, however, exceeded the desired goal, as it required disclosable interests to be aggregated and disclosed not at the level of the relevant financial group, but at the level of the person holding a controlling interest in such financial group. This created often inextricable difficulties to privately-held financial institutions such as private banks or hedge fund managers, or to institutions controlled by governmental bodies such as cantonal banks.

Proposed amendment to FMIO-FINMA

Further to the numerous clarification and exemption requests that the Disclosure Office of SIX Swiss Exchange and FINMA received in connection with the new rules, FINMA is now proposing to amend FMIO-FINMA to make it clear that the duty to disclose positions held for the account of third parties rests with the entity which has the discretionary authority to exercise the corresponding voting rights, and not with the person ultimately controlling such entity.

FINMA expects the revised rules to enter into force in **early 2017**, although the exact date is not yet known. The revised FMIO-FINMA would contain a transition period, which FINMA expects to last three months. During the transition period, disclosures could be made in accordance with the current regime or with the new rules. Disclosures made under the current regime would have to be revised before the end of the transition period.

Comments

The proposed changes to FMIO-FINMA address the main issue that the new rules created, and are consequently welcome. Many questions remain, however, open. In particular, the regime that will apply to the disclosure of positions held by collective investment schemes that are "sponsored" by a financial group is likely to continue to raise questions. Under the proposed revised rules, it remains unclear whether such positions would have to be disclosed by the parent company of the "sponsor" group, or by the person who controls such parent company.

The consultation on the revised FMIO-FINMA will last until 3 October 2016. Given the practical significance of the topic and the criminal liability that can be incurred in case of a breach, it is desirable that these issues be addressed before the final rules are adopted, and that market participants consequently make their voice heard in FINMA's consultation process.

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

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