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Update

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Swiss rules on disclosure of significant interests in listed companies - Changes to the aggregation rules regarding client positions

- **As from 1 March 2017, positions held for the account of third parties can be aggregated at the level of the entity that has the discretionary authority to exercise the relevant voting rights (typically an asset manager) or - alternatively - at the level of the person who ultimately controls such entity.**
- **The new rules provide for a transition period of six months for implementation.**
- **Filings made prior to March 2017 are not grandfathered - Previous disclosures of client positions must be updated by 31 August 2017.**
- **Despite the criticisms expressed by market participants during the consultation process, the disclosure regime applicable to positions held by collective investment schemes (funds) that are not authorized for public distribution in Switzerland and that do not satisfy the independence requirements defined by FINMA remains unchanged. Consequently, positions held by such funds will continue to be treated as own account positions of the person who ultimately controls the relevant fund's sponsor.**

On 14 February 2017, FINMA announced that it was changing the rules of its Ordinance on Financial Market Infrastructure (FMIO-FINMA) regarding disclosure of significant interests in listed companies with effect as of 1 March 2017.

Under the new regime, positions held on the account of third parties by asset managers and similar holders with the discretionary authority to exercise the voting rights will no longer have to be aggregated and disclosed at the level of the person or entity that ultimately controls the relevant asset manager as is currently the case. It will be **possible to aggregate and disclose these positions at the level of the entity that is effectively making the decisions with respect to the exercise of the voting rights**. Depending on the circumstances, this entity can be the asset management entity itself (*i.e.* the entity that has the contractual relationship with the relevant client) or an entity higher up in the chain of control, but then only if that particular entity is effectively controlling the manner in which the voting rights are being exercised by its subsidiaries. **In addition, it remains possible to aggregate and disclose client positions at the**

level of the ultimate controller of the relevant asset manager (even if such ultimate controller is not controlling the manner in which the voting rights are being exercised by the controlled entities), but **on an optional basis** only. Holders that are making use of this option and are aggregating their client positions at the level of the ultimate controller must disclose this expressly in their filings.

The new rules contemplate a **transition period of six months** for their implementation. Significant interests in issuers that are in scope of the Swiss disclosure rules (*i.e.* Swiss issuers having equity securities listed on a Swiss stock exchange or foreign issuers having a main listing for their equity securities on a Swiss stock exchange) must be disclosed in compliance with the new rules **by 31 August 2017**. Contrary to what had been the case when the current disclosure regime was introduced in January 2016, **notices of shareholdings that were made before entry into effect of the new rules are *not* grandfathered**. Accordingly, all investors with current disclosure filings that include **client positions** will need to **update** their filings **by 31 August 2017** and either exclude in their filing such client positions or add an express note in their filing that they report such client positions on an aggregated basis. In case the client positions are no longer aggregated at the level of the person or entity that ultimately controls the relevant asset manager, the relevant asset manager has to make a disclosure notice by its own, if by such change in the reporting of client positions a disclosure threshold at the level of the asset manager is reached or crossed.

During the consultation that preceded the adoption of the new rules, several market participants requested that FINMA amend not only the manner in which asset managers aggregate and disclose client positions, but also the manner in which positions held through collective investment schemes (*i.e.* funds) that are not authorized for public distribution in Switzerland and do not satisfy the strict independence requirements set forth in the FMIO-FINMA are disclosed. Under the current regime, such positions are effectively deemed to be beneficially owned by the person or entity that controls the sponsor of the relevant investment funds, which is often confusing. Although many market participants had invited FINMA to change this regime during the consultation process, FINMA declined to do so and decided to maintain the status quo, arguing that the current regime is "well established" and does not need to be amended.

The new regime does not affect the disclosure regime that applies with respect to positions that are held for own account. When held through controlled entities, such positions will continue to have to be aggregated and disclosed at the level of the ultimate controller of the relevant holder.

Comments

FINMA's decision to amend the manner in which asset managers must aggregate and disclose client positions was long expected. The initial text of FMIO-FINMA, which became effective in January 2016, required all client positions to be aggregated at the level of the entity that exercises the ultimate control over the relevant asset manager – and not at the level of the asset manager itself. It quickly turned out that this regime created often unsolvable problems to privately-held managers (*e.g.* hedge fund managers, private banks or family-controlled financial groups) and state-owned institutions such as cantonal banks. FINMA acknowledged the need for change in August 2016, when it consulted on a proposed amendment to FMIO-FINMA.

The regime that was finally adopted is slightly different from the one that was initially proposed. The text on which FINMA consulted in August 2016 required that client positions be aggregated and disclosed at the level of the entity that is effectively making the decisions with respect to the exercise of the voting rights. The option to aggregate positions at the level of the ultimate controller of the relevant asset manager was added to accommodate the wishes of certain asset management groups. The resulting regime is welcome, as it provides flexibility and addresses one of the major flaws of the 2016 disclosure rules.

This positive development is, however, somehow tarnished by FINMA's refusal to reconsider the aggregation regime that applies to funds that are not authorized for public distribution in

Switzerland and that do not satisfy the independence requirements set forth in FMIO-FINMA (which are in practice the vast majority of existing funds). The current regime creates the fiction that positions held by such funds are beneficially owned by the ultimate controller of the funds' sponsor. This, however, does not correspond to the economic reality (the economic risk of positions held by funds is borne by the funds' investors, and not by the funds' sponsor or the person who controls the funds' sponsor) and makes the relevant disclosures confusing.

Despite this flaw, the new regime is overall positive and constitutes a welcome development.

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

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