# Update

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## Disclosure of shareholdings: Swiss Supreme Court holds obligations imposed on investment managers to be invalid

In a decision dated 29 July 2013 (Ref. 2C_98/2013), the Swiss Supreme Court held that the regulations of the Swiss Financial Market Supervisory Authority (FINMA) requiring investment managers to aggregate their clients' positions with their own for disclosure purposes are invalid.

Swiss law requires holders of significant interests in Swiss and certain foreign companies having equity securities listed in Switzerland to notify the company and the relevant stock exchange when their positions reach, exceed or fall below certain thresholds (*e.g.* 3%, 5%, 10%, 15%, 20%, 25%, 33 1/3%, 50% or 66 2/3% of the company's voting rights). This duty to notify lies with the beneficial owner of the relevant positions, *i.e.* with the person that is in a position to control the exercise of voting rights either directly, or indirectly through controlled entities.

However, FINMA's regulations do not only require beneficial owners to disclose significant interests in listed companies. They oblige investment managers that hold positions for the account of their clients and with respect to which they are entitled to exercise voting rights to do the same if these positions – when aggregated with their own – reach, exceed or fall below a disclosure threshold. Under FINMA's regulations, the investment manager's duty to notify is independent from, and comes in addition to, the duty imposed on the beneficial owners. A position may consequently have to be reported twice: once by its beneficial owner, and once by the beneficial owner's investment manager.

The Supreme Court found that, under the Federal Act on Stock Exchanges and Securities Trading (SESTA), the duty to notify significant interests in listed companies only applies to positions held "for own account". SESTA does not permit this duty to be extended to positions held for the account of third parties. FINMA had consequently overstepped its rulemaking authority when it enacted such a regime. Its rules requiring investment managers to aggregate their clients' positions with their own for disclosure purposes lacked an adequate statutory basis and were consequently found to be invalid.

The Supreme Court's decision is bound to have far reaching consequences for investment mangers across the world (and in particular for hedge funds managers), as it impacts the manner in which such managers will have to report positions in Swiss and foreign companies having a main listing in Switzerland in the future. More specifically, the decision requires that a distinction be made between positions held for own account and for the account of third parties. Such a distinction may be difficult to make in practice, in particular where positions are being held through collective investment schemes that are not authorized for distribution in Switzerland, and with respect to which a "beneficial owner" may be difficult to identify.

The Supreme Court's decision raises many questions and may require the Disclosure Office of the SIX Swiss Exchange to clarify its policies. It remains also to be seen whether the Swiss Parliament or FINMA will submit investment managers to a new disclosure regime.

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

## Your Contacts

**Geneva / Lausanne**
François Rayroux
francois.rayroux@lenzstaehelin.com

Jacques Iffland
jacques.iffland@lenzstaehelin.com

Telephone + 41 58 450 70 00

**Zurich**
Rudolf Tschäni
rudolf.tschaeni@lenzstaehelin.com

Hans-Jakob Diem
hans-jakob.diem@lenzstaehelin.com

Telephone +41 58 450 80 00

## Our Offices

**Geneva**
Route de Chêne 30
CH-1211 Genève 17
Telephone +41 58 450 70 00
Fax +41 58 450 70 01
geneva@lenzstaehelin.com

**Zurich**
Bleicherweg 58
CH-8027 Zürich
Telephone +41 58 450 80 00
Fax +41 58 450 80 01
zurich@lenzstaehelin.com

**Lausanne**
Avenue du Tribunal-Fédéral 34
CH-1005 Lausanne
Telephone +41 58 450 70 00
Fax +41 58 450 70 01
lausanne@lenzstaehelin.com

www.lenzstaehelin.com