

Disclosure of significant interests in listed companies' voting securities: the Swiss approach

www.practicallaw.com/0-502-1078

Alexander Vogel, Christoph Heiz and Andrea Sieber
meyerlustenberger

On 1 January 2009, the rules in Switzerland governing the disclosure obligations relating to interests in listed companies' voting securities were substantially revised.

The Stock Exchange Act (SESTA) sets out the general principles of the disclosure rules. SESTA was substantially amended in December 2007. However, it was not until January 2009 that the Swiss Financial Supervisory Authority (FINMA) brought into force a completely revised Stock Exchange Ordinance (SESTO-FINMA), which provides the detailed provisions for the implementation of these principles. In addition, over the last year the authorities in charge of supervising compliance with the disclosures obligations in Switzerland have started a number of investigations into potential violations of the rules. Decisions have been handed down in a number of these investigations, which have attracted significant attention in the media and are intensively discussed in interested circles (*see box, Recent investigations*).

This chapter looks at the:

- Background to the revised disclosure regime.
- Amendments in effect since mid-2007.
- Securities and instruments covered by the disclosure rules.
- Direct or indirect holdings or interests that trigger disclosure obligations.
- Disclosure requirements for parties acting in concert or organised groups.
- Disclosure requirements for securities lending, repurchase transactions and collateralisation.
- Basket system and notification thresholds.
- Deadlines and formalities.
- More stringent disclosure requirements that apply during a takeover procedure.
- Exemptions for banks, securities dealers and collective investment schemes.
- Sanctions for non-compliance.
- Other disclosure requirements.

BACKGROUND TO THE REVISED DISCLOSURE REGIME

Under the disclosure rules in force up to November 2007, any building of a stake in a company listed on a Swiss stock ex-

change had to be disclosed once the holding reached 5% or more of that listed company's shares or options. Further reporting requirements were triggered when the stake exceeded or fell below the threshold percentages of 10%, 20%, one-third, 50% or two-thirds of the voting rights.

These rules were subject to criticism, in particular over the following:

- The acquisition or writing of call options and/or the writing of put options on less than 5% of voting rights was exempt from the reporting obligations regardless of the percentage of the pre-existing shareholding of the party entering into the transaction. This meant that a potential acquirer could combine an acquisition of 4.99% of the target's shares with an acquisition of call options on 4.99% of the target's shares without having to report either of those holdings. (This is also possible under Directive 2004/109/EC on transparency requirements for securities admitted to trading on a regulated market and amending Directive 2001/34/EC (Transparency Directive).)
- Only the acquisition or sale of options providing for physical settlement needed to be reported. Acquirers used this to have financial intermediaries build up significant stakes in a target, of below 4.99% of the total number of the outstanding shares, with a view to acquiring those stakes at a later stage (for example, the buyout fund Laxey's attempt to obtain control of the construction group Implenia).

This gave rise to a number of controversial cases in which bidders secretly built up stakes in traditional Swiss companies, and confronted the target and the remaining shareholders with a dominating minority stake, aggressive shareholder activism, and either a:

- Serious takeover attempt (in the case of Implenia (*see above*), and Ascom).
- Successful change of control (in the cases of Unaxis/Oerlikon, Sulzer and Saurer).

These cases increased the pressure on the legislator to enact amendments to the existing disclosure rules. In addition to the amendments, the regulator has made efforts to more effectively follow up on complaints about alleged violations of the disclosure rules (*see box, Recent investigations*).

AMENDMENTS SINCE MID-2007

Since mid-2007, the Swiss Parliament and the FINMA have implemented several initiatives to tighten the disclosure rules and

close existing and potential loopholes. The new rules decreased the 5% initial disclosure threshold (which was in line with the EU Transparency Directive) to 3% (which is in line with the stricter disclosure rules of, for example, the UK, Germany or Spain). They have also introduced new disclosure thresholds at 15% and 25% (also in line with the EU Transparency Directive).

The vast majority of the other changes are aimed specifically at the derivative structures previously used by potential acquirers to avoid early disclosure of their plans. Both the SESTA and its implementing regulations were changed in order to close existing loopholes that had allowed raiders to sneak up on listed companies (*see above, Background to the revised disclosure regime*). These changes include:

- A requirement to aggregate all acquired positions, including derivatives. This eliminated the possibility of an acquirer with 4.99% of the target's shares and another 4.99% in long options having a total undisclosed stake of 9.98%.
- The removal of the exemption for cash-settled options.
- A tightening of the rules on indirect acquisitions, that is, other types of transactions or agreements (in particular options, swaps, contracts for difference or similar transactions) that a party enters into with a view to subsequently launching a tender offer, even if they do not give that party a firm entitlement to the acquisition of shares or other voting securities.
- New sanctions for violations of the reporting requirements (*see below, Sanctions for non-compliance*).

SECURITIES AND INSTRUMENTS COVERED BY THE DISCLOSURE RULES

SESTA only requires disclosure for interests in companies:

- Incorporated in Switzerland.
- With at least one type of (voting or non-voting) equity securities officially admitted to trading on a regulated exchange in Switzerland.

It therefore only applies to companies with their registered office in Switzerland and not to foreign issuers who are listed in Switzerland.

The disclosure requirements only apply to interests that directly or indirectly carry voting rights, including:

- Equity securities (whether or not listed).
- Derivatives.
- Other financial instruments relating to equity securities.

It is irrelevant whether or not the attached voting rights can actually be exercised. Voting-rights restrictions provided for in an issuer's articles of incorporation or resulting from transferability restrictions are not taken into consideration. Conversely, since non-voting shares, bonus certificates and similar instruments do not confer voting rights, their purchase and sale need not be disclosed.

NOTIFIABLE DIRECT OR INDIRECT HOLDINGS OR INTERESTS

Before the 2007 reforms, share and derivative positions could be calculated separately and the disclosure obligation was only triggered if either holding reached the then lowest threshold of 5%, in line with the EU Transparency Directive. Under the new rules, a broadly defined set of interests in equity securities need to be aggregated on a gross basis (that is, long and short positions cannot be netted and must be disclosed separately).

Indirect holdings through fiduciary holdings, direct or indirect subsidiaries or other legal entities or otherwise must now be aggregated with direct holdings when calculating the thresholds, but must be identified separately in the notification(s) made to the company and to the stock exchange.

Indirect or potential holdings of shares must also be included. These are interests in shares held by virtue of a (potential) right to acquire or sell shares, in particular, options or conversion rights. The new rules specifically provide that options or other financial instruments providing for a cash settlement are included in the calculation of relevant holdings, irrespective of whether or not they are conditional on the counterparty exercising its rights under them. The amendments also introduce a disclosure obligation for the acquisition and sale of put options (or other rights to sell underlying securities) and the granting of call options (or other rights to acquire underlying securities), which had previously been exempt.

Financial instruments for these purposes are widely defined to include derivative contracts, including:

- Straight options.
- Warrants and conversion rights.
- Structured products combining these instruments.
- Financial arrangements such as total return swaps.

Due to these changes, cash-settled swaps, with or without any embedded physical options or forwards relating to the underlying securities, must be disclosed if the notional amount (that is, the notional number of underlying securities) exceeds any threshold percentage together with any other direct, indirect or derivative positions held.

DISCLOSURE REQUIREMENTS FOR PARTIES ACTING IN CONCERT OR ORGANISED GROUPS

Voting securities must be aggregated when held by:

- Different members of an organised group.
- Persons acting in concert.

Changes in the composition of the group, or in the persons involved, as well as in the type or content of their arrangement, must also be disclosed. However, transfers within an organised group do not have to be disclosed (known as the black box rule) (*Article 10, SESTO-FINMA*). It can be difficult to determine whether an acquirer acts independently of, or in concert with, third parties, or if the relationship or discussions between different shareholders and/or a potential acquirer of shares qualify as persons acting in concert, since no specific degree of formal co-operation is required.

DISCLOSURE REQUIREMENTS FOR SECURITIES LENDING, REPURCHASE TRANSACTIONS AND COLLATERALISATION

Before the new rules came into force on 1 January 2009, securities lending and repurchase transactions were only subject to a disclosure obligation if the borrower or acquirer could exercise the voting rights attached to the borrowed or acquired securities. The new rules radically change that and provide that, as a general rule, when calculating the relevant threshold it is necessary to include the following transactions:

- Securities lending.
- Repurchase transactions.
- Title transfers for collateralisation purposes.

The party temporarily taking over the equity securities must disclose this at the beginning of the transaction. The party taking back the equity securities must disclose this when the retransfer occurs. Only securities lending and repurchase transactions that are traded through a trading platform in order to generate liquidity are exempt from the disclosure obligations and banks and securities dealers have certain exemptions (*see below, Exemptions for banks, securities dealers and investment schemes*)

BASKET SYSTEM AND NOTIFICATION THRESHOLDS

Under the new rules, it is not possible to give a net value for long and short positions (for example, call options and put options on the same underlying securities) and they must instead be aggregated and disclosed separately.

The new regime gives three potentially overlapping disclosure categories:

- **Long basket.** Indicating all acquisition positions.
- **Short basket.** Indicating all disposal positions.
- **Underlying basket.** Indicating the net position of all holdings in the underlying shares, excluding derivative positions (*Article 16 lit. a (4), SESTO-FINMA*).

The exercise or non-exercise of derivative positions or other financial instruments must be disclosed separately.

These new rules aim to prevent potential raiders from giving a net-holdings value that disguises their actual holdings in the target (for example by buying in money call options while at the same time selling out of money call options or buying out of money put options).

The relevant percentages triggering the obligation to disclose and to notify are 3%, 5%, 10%, 15%, 20%, 25%, one-third, 50% and two-thirds, and are slightly different from the thresholds provided for in the EU Transparency Directive. In Switzerland, in contrast to other European jurisdictions, once a holder has exceeded the 3% threshold, only a decrease below 3% or an increase exceeding any higher percentage threshold requires further notification (bearing in mind changes in the underlying basket). Changes in voting-right proportions between the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, one-third, 50% and

two-thirds are not subject to any disclosure obligation.

No notifications are required for disposals below 3%. The notification that the holder's total percentage has fallen below 3% can be limited to this fact and does not have to indicate the actual holding percentage below 3%. The percentage thresholds are calculated by reference to the number of voting securities registered in the register of commerce at the time. It is therefore possible for a holder's percentage of the overall voting rights to increase or decrease so as to require a notification, without the holder purchasing or selling any shares or financial instruments, for example, due to a change in the issuer's total voting rights. Further guidance on those issues with calculation examples is provided in the FINMA's explanatory notes.

Finally, no disclosure or notification is required where holdings temporarily (during the course of a trading day) reach, exceed or fall below a relevant threshold.

DEADLINES AND FORMALITIES

In general, any holder of a position requiring notification must disclose the relevant details to the:

- Issuer.
- The relevant stock exchange's disclosure office.

Each stock exchange maintains a disclosure office that:

- Receives notifications of shareholdings.
- Supervises shareholders and issuers' compliance with the disclosure rules.
- Grants exemptions or relief from disclosure and reporting requirement in particular cases.
- Gives preliminary decisions on whether a duty to notify exists or not.

Notifications must be submitted in writing within four trading days of the party:

- Entering into contractual arrangements that result in a position requiring notification.
- Being informed (or being deemed to be informed by publication in the official commercial gazette) of a change requiring notification.

The factual details to be given in the notification depend on the type of holding (direct, indirect, acting in concert or as an organised group) (*Article 21, SESTO-FINMA*).

Notifications can be submitted by fax or electronic means (although the original document must subsequently be supplied). Forms are provided but are not mandatory and reporting holders are free to use their own format as long as all notifications are made in English, French or German.

Issuers must:

- Publish a notification of a notifiable shareholding no later than two trading days of having received it.
- Report to the stock exchange any changes in their overall

voting rights and capital at the end of any month in which the changes occur.

- File any changes in their capital structure (with the exception of newly created shares from conversion or option rights issued under the conditional capital) in due course (generally, before the end of the month) with the register of companies for publication in the official *Commercial Gazette*.

Depending on the stock exchange, publication must be through either:

- An electronic publication platform operated by the disclosure office (in case of issuers listed on the SIX Swiss Exchange).
- The official commercial gazette and the main electronic media specialising in stock market data (in the case of issuers listed on the BX Exchange).

EXEMPTIONS FOR BANKS, SECURITIES DEALERS AND INVESTMENT SCHEMES

Exemptions apply to banks and securities dealers' holdings if (*Article 18, SESTO-FINMA*):

- Their aggregate holdings are less than 10% of the total voting securities.
- They have no intention of exercising the voting rights conferred by the equity securities.

To be exempt the holdings must be held in connection with:

- Their trading book and be less than 5% of the total voting rights.
- Securities lending, repurchase transactions or transfer of title for collateralisation purposes (including other directly or indirectly held positions) and be less than 5% of the total voting rights.
- Clearing or settlement for a maximum of three trading days and be less than 10% of the voting rights.

These exemptions therefore effectively make the relevant percentage thresholds for banks and securities dealers 5% or 10% (for the mentioned categories of holdings).

In contrast to other jurisdictions, the Swiss disclosure rules do not provide exemptions for custodians, sub-custodians or clearing and settlement firms or organisations, since, as a general rule, they do not hold the securities on their own behalf, but for the ultimate holder, that is, the customer of the bank or the securities dealer.

Specific rules apply to investment managers of collective investment schemes to the extent that the schemes either:

- Qualify as collective investment schemes authorised by the Collective Investment Schemes Act (CISA) and are therefore admitted for public distribution in Switzerland.
- Are foreign investment schemes but have filed a written request with the relevant disclosure office at least ten trading days before the reporting obligation arises.

The investment manager must notify triggering holdings concerning:

RECENT INVESTIGATIONS

Recent efforts have been made to more effectively follow up on complaints from target companies and other market participants about alleged violations of the disclosure rules.

The authorities have been less lenient than they were over alleged violations in the past, as has been shown by recent cases, including:

- The build up of significant stakes by Viktor Vekelsberg's Renova group in:
 - technology group OC Oerlikon Corporation;
 - machinery and equipment manufacturer Sulzer.
- French insurance group Scor's public offer for the shares of Convergium. Both the Takeover Board and the FINMA concluded that Scor acted in concert with Martin Ebner, an active minority shareholder, and that therefore:
 - the disclosure rules had to be complied with on an aggregate basis (including Mr Ebner's positions);
 - the best-price rule had to be applied, not only taking into consideration transactions entered into by Scor and its affiliates, but also all transactions entered into by Mr Ebner and all legal entities controlled by him.
- Giorgio Behr's acquisition of a major stake of sia Abrasives to obtain control.

The fines imposed on the Renova group and two other participants (who allegedly formed a non-disclosed group together with Renova) in the Oerlikon acquisitions amounted to CHF40 million (about US\$37.25 million) each (a total of CHF120 million (about US\$111.75 million)). This was the focus of intense media coverage and public debate.

The investigations into the Renova group's acquisition of a significant stake in Sulzer and the sia Abrasives transaction are ongoing.

- All collective investment schemes: on an aggregate basis.
- Each collective investment scheme if they individually reach, exceed or fall below the relevant thresholds.

However, the investment manager does not have to disclose any information on the identity of investors and if an investment manager is part of a group of companies, it does not have to consolidate the holdings of the collective investment schemes that it manages with those held by the group.

SANCTIONS FOR NON-COMPLIANCE

Failure to comply with disclosure obligations can constitute a criminal offence, and sanctions include:

- **Heavy fines.** The fine can be up to double the purchase price or the sale proceeds, calculated by reference to the difference between the new shareholding held by the acquirer and the last shareholding reported.

- **Suspension of voting rights.** The FINMA (or, if the acquisition was made with the intention of submitting a tender offer, the Takeover Board), the target company or a target company shareholder can request the competent court to suspend the acquirer's voting rights under the securities in question for:
 - up to five years; or
 - permanently, if the acquisition was made with the intention of submitting a tender offer.

Acquirers must therefore be careful when building up a significant stake in a target company with the intention of later launching a tender offer. A potential violator risks considerable damage to its reputation that could be a significant disadvantage in a narrow takeover bid.

In addition, an inadvertent acquisition of a position exceeding the one-third statutory threshold will trigger the mandatory takeover bid obligation to launch a tender offer for the target company at a minimum price. The minimum price would then have to take into consideration (as the Takeover Board decided in the Saurer case) the value of any options, other derivatives or similar rights obtained or granted by the acquirer to other market participants from whom it acquired blocks of shares in order to build up a significant stake.

Banks and securities dealers also need to be aware of the risk when acting for clients who intend to obtain control of a target company through derivative transactions. Such institutions could be considered a party acting in concert with their client. Even though parties acting in concert are not usually liable to shareholders for failure of the forced offeror to launch an offer and to pay the required consideration to the other shareholders in lieu of the forced offeror, in the worst case, they could be jointly and severally liable for fines should the client fail to fulfil its disclosure obligations. Finally, if the client inadvertently exceeds the one-third threshold (taking into consideration certain indirect holdings of the client consisting of derivative positions or the holdings of parties allegedly acting in concert) and must launch a mandatory tender offer for the target company, the bank, securities dealer or derivative house might become liable for incomplete or wrong advice if it fails to make the client aware of the relevant regulations and disclosure obligations at an early stage.

DISCLOSURE REQUIREMENTS DURING A TAKEOVER PROCEDURE

The SESTA and the takeover regulation impose more stringent disclosure and reporting requirements for direct or indirect interests in shares during an offer period, that is, from publication of a tender offer until the expiration of the additional acceptance period. In particular, the offeror must notify the Takeover Board and the relevant stock exchange's disclosure office of any transactions conducted in the target company's equity securities (or of any financial instruments relating to them). In a public exchange offer, the offeror must also notify any transactions in the securities (or of any financial instruments relating to them) offered in exchange. This also applies to persons acting in concert with the offeror or any significant shareholder that takes part in the procedure by applying for status as a party in order to be able to submit comments or objections to the offer to the Takeover Board.

During the offer period, the Takeover Board can also impose disclosure obligations on persons who directly or indirectly (or by acting in concert with third parties) own or control 3% or more of the voting rights (whether exercisable or not) in either the target company or company whose shares are offered as consideration in an exchange offer.

During the takeover period, a detailed report must be filed daily, containing information on the:

- Volume of each transaction
- Type of transaction.
- Price.
- Time of trading.
- Whether traded on or off-market.
- Identity of the stockbroker.
- Type and number of equity securities (and/or financial instruments) and voting rights held at the end of the day.

Reports must reach the Takeover Board and the relevant disclosure office by 12 noon on the trading day following the transaction. The Takeover Board publishes all transactions on its website.

OTHER DISCLOSURE REQUIREMENTS

Further disclosure obligations exist for certain management transactions if the issuers are listed on the SIX Swiss Exchange. The issuer must disclose transactions concluded by members of its board of directors and senior management involving:

- Its equity securities.
- Conversion and purchase rights on its shares.
- Financial instruments whose price is materially dependent on its equity securities.

The members of the board of directors and senior management must inform their company of all transactions that fall within the scope of the relevant regulation. The notification deadline and whether or not the transactions are published on the exchange's website depend on the total transaction volume per calendar month.

CONTRIBUTOR DETAILS

**Alexander Vogel, Christoph Heiz and Andrea Sieber
meyerlustenberger**

T +41 44 396 91 91

F +41 44 396 91 92

E a.vogel@meyerlustenberger.ch

c.heiz@meyerlustenberger.ch

a.sieber@meyerlustenberger.ch

W www.meyerlustenberger.ch