New rules on Swiss disclosure duties

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New disclosure rules under the Stock Exchange Act

Under the Swiss Federal Act on Stock Exchanges and Securities Trading (SESTA), any shareholder of a Swiss company traded on a Swiss exchange who directly, indirectly or in concert with third parties acquires or sells for its own account shares or purchase rights and thereby reaches, falls below or exceeds certain threshold percentages of voting rights (three per cent, five per cent, ten per cent, etc), whether or not exercisable, must notify the issuer and the stock exchange. Failure to satisfy the disclosure obligation may trigger a fine or a suspension of voting rights.

With effect as of 1 January 2012, the Ordinance of the Swiss Financial Market Supervisory Authority (SESTO-FINMA) has been partially revised. The amended SESTO-FINMA provides for new disclosure rules for foreign collective investment schemes and clarification in case of precisely reached thresholds.

New disclosure rules for foreign collective investment schemes

Collective investment schemes licensed for distribution in Switzerland

In principle, a disclosure notification must be made by the beneficial owners of the voting rights. As an exemption, the SESTO-FINMA does not require a notification by the beneficial owner investing into a Swiss collective investment scheme or a foreign collective investment scheme *licensed* for distribution in Switzerland by the FINMA. Instead it is the licensee (eg fund management company or investment company) responsible for the collective investment scheme who has to file a disclosure notification. This means that with respect to such investment schemes licensed for distribution in Switzerland there is no look-through from the issuer of equity securities to the ultimate beneficial owner (ie the investor into the collective investment scheme), instead there is a disclosure cut-off on the level of the collective investment scheme.

The revision provided for a further clarification, insofar as fund management companies of licensed collective investment schemes belonging to a group of companies are not required to consolidate their holdings with those of the other group companies.

Collective investment schemes not licensed for distribution in Switzerland

Previous law

Also, with respect to foreign collective investment schemes not licensed for distribution in Switzerland, the disclosure obligations lie with the licensee of the collective investment scheme and not with the beneficial owner, that is, the investor in the collective investment scheme. The question of the need to disclose holdings on a consolidated basis if the collective investment scheme belonged to a group of companies was more controversial. Until 31 December 2011, *foreign* collective investment schemes *not licensed* for distribution in Switzerland could also demand relief from disclosure obligations if they could show that:

- they (or rather the licensee) were not dependent on other companies within their group; and provided that
- such evidence of independence has been confirmed by the competent foreign authority supervising the foreign collective investment scheme.

These two requirements often caused difficulties in the past. First of all, Swiss law would deem a foreign collective investment scheme belonging to a group of companies as being already inherently dependent on the same. Hence, it is factually impossible to provide hard evidence of a general independence from a group of companies if, at the same time, one forms part of the same.

In addition, and possibly for the same reason, foreign supervisory authorities, as a matter of fact, were mostly not able and, in particular, not prepared to issue a confirmation stating the foreign collective investment scheme's independence from the group of companies. Hence, foreign collective investment schemes not licensed

for distribution in Switzerland were actually prevented from the disclosure reliefs granted to licensed collective investment schemes.

New law

Due to these factual hurdles, FINMA, as of 1 January 2012, defined the degree of independence required. The new definition now focuses on the main question of exercising voting rights. Hence, the fund management company or the investment company, as the case may be, is deemed to be independent if it can exercise the voting rights for the equity securities it manages *at its own discretion.* The prerequisites for such an independence are, in particular, the following:

- independence on a *personal* level, that is, the persons of the fund management company or the investment company entrusted with the exercise of the voting rights act independently from the parent entity of the group and from companies controlled by it; *and*
- *organisational* independence, that is, through the organisational structures of the group, it is ensured that the parent entity does not influence the exercise of voting rights by the fund management company or the investment company, as the case may be, through the issue of instructions or in any other way and there is no exchange or dissemination of information between the parent entity and the fund management company which could lead to such influence of exercising voting rights.

In order for the disclosure office to assess whether or not the criteria for personal and organisational independence is satisfied the parent entity (or group of companies) must file the following documents with the disclosure office:

- a list of names of the fund management companies or the investment companies – subsequent changes to the list have to be supplied on an ongoing basis; *and*
- a declaration confirming that the independence requirements are met and will continue to be met.

It is explicitly stated that information on the identity of investors is not required. FINMA furthermore stated that there is no need to file a company chart in order to show that the company is independent from the parent entity or the group of companies. It was enough if the documents made the independence plausible.

Disclosure obligations in the case of precisely reached thresholds

Since the disclosure obligations stipulated by SESTA provide for a duty to disclose when certain thresholds are reached, exceeded or fallen below, the question arose as to how to deal with cases where an investor precisely reaches (eg five per cent of voting rights and thereafter leaves said threshold towards the next higher or next lower threshold). As any increase or reduction of participation above or below the threshold could be understood as exceeding or falling below a threshold, one could argue that a new obligation to disclose such movement is triggered.

The revised SESTO-FINMA now provides for an understanding according to which a threshold in principle always belongs to the increases up to the next higher threshold. This means that an investor reaching precisely five per cent of the voting rights and thereafter leaving said threshold towards, but without reaching, the next higher threshold, ie ten per cent, has no obligation to make a new disclosure notice due to having left the five per cent threshold. However, if the five per cent threshold is left towards the next lower, ie three per cent, this would trigger a disclosure obligation due to having fallen below the five per cent threshold.

In the event where an investor has acquired and disclosed (eg seven per cent of the voting rights), such investor would not be obliged to make a further disclosure notification if subsequently they reduce their participation precisely down to the next lower threshold, ie five per cent. However, the investor would obviously be obliged to make a new disclosure notification if he falls below five per cent or if he reaches the next higher threshold, ie ten per cent. Hence, movements within the range of two given thresholds *including the lower threshold* (eg between and including five per cent up to 9.99 per cent) are not subject to any disclosure obligation.