January 2016

Newsletter

Special Edition

Changes to Swiss Rules on Disclosure of Qualified Shareholdings

Effective 1 January 2016, the rules governing the disclosure of qualified shareholdings in companies (Swiss or foreign) listed on any of the Swiss Stock Exchanges have been removed from the Swiss Stock Exchange Act (SESTA, *BEHG*) and incorporated into a new statutory bill (the Financial Market Infrastructure Act (FMIA, *FinfraG*) and its implementing ordinances. As part of this move, the legislator seized the opportunity to introduce a number of changes which are important for everyone subject to the disclosure regime, including the issuers of shares.

walderwyss attorneys at law

Changes to Swiss Disclosure Rules under the FMIA

By Alexander Nikitine
Dr. iur., LL.M., Attorney at Law
Partner
Phone +41 58 658 56 32
alexander.nikitine@walderwyss.com

and Sarah Schulthess
Master of Law, LL.M., Attorney at Law
Phone +41 58 658 52 74
sarah.schulthess@walderwyss.com

and Valentin Wiesner
Master of Law
Phone +41 58 658 52 33
valentin.wiesner@walderwyss.com

On 1 January 2016, the Financial Market Infrastructure Act (**FMIA**, *FinfraG*) and its implementing ordinances came into effect. The legislation has its origin in the financial crisis and the G20 member states' agreed direction to enhance stabilization and transparency in the financial markets and to closely supervise over-the-counter trading of derivatives.

The rules governing the disclosure of qualified shareholdings in companies (Swiss or foreign) listed on the SIX Swiss Exchange (**SIX**) or on the Berne eXchange previously embedded in the Swiss Stock Exchange Act (**SESTA**; *i.e.* article 20 *et seq.* SESTA) have now been incorporated into the FMIA and its relevant ordinance (FMIO-FINMA). In an effort to reduce complexity in the disclosure process, the legislator introduced a number of interesting changes to the disclosure rules.

To help ensure staying compliant, those subject to the Swiss disclosure regime are advised to keep a close eye on the new rules.

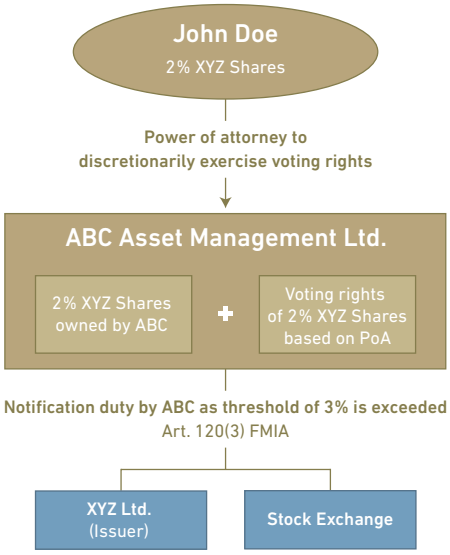
Disclosure of Shareholdings – Revised Rules as per 1 January 2016

General Disclosure Rule

Since 1 January 2016, the general rule for disclosure obligations has been set out in article 120 FMIA. Anyone who acquires or disposes shares or acquisition or sale rights relating to shares of a Swiss or foreign company whose equity securities are listed in Switzerland, and thereby reaches, falls below or exceeds the relevant thresholds of the voting rights (3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50% or 66⅔%), must notify this to the issuer and to the SIX/BX. To this end, the initial listing of equity securities (IPO), the conversion of participation certificates or profit-sharing certificates into shares, the exercise of conversion or acquisition rights, changes in the share capital as well as the exercise of sale rights are deemed equivalent to an acquisition or disposal (article 120(4) FMIA). The disclosure obligation is further specified in the FMIO-FINMA. In substance, the general rules have remained unchanged.

Amended Disclosure Regime

– Disclosure obligation for persons having discretionary voting rights:
According to the new article 120(3) FMIA, persons who have the discretionary power to exercise the voting rights associated with equity securities pursuant to article 120(1) FMIA need to brace themselves for a key change. In answer to a Swiss Federal Supreme Court judgement in 2013, the Swiss legislator now enshrined the underlying rule on federal act level by introducing article 120(3) FMIA. Under this rule, a person who may discretionarily exercise voting rights of equity securities must henceforth take such equity securities into account when determining whether a threshold is reached or crossed. As illustrated by the example (***cf.*** next page) this will generally have a particular impact on asset managers who are now obliged to take into account not only own shares but also any shares for which they have the discretionary power to exercise the voting



rights when determining whether disclosure thresholds have been reached or exceeded. However, this rule does not apply to financial intermediaries who acquire or dispose shares or acquisition or sale rights on behalf of third parties (*cf.* article 120(2) FMIA).

In substantiating the notification obligation, article 22(2)(a) FMIO-FINMA stipulates that in cases of article 120(3) FMIA, the general information to be provided pursuant to article 22(1) FMIO-FINMA must be supplemented by the percentage of voting rights covered by the underlying authorization to exercise (*Ausübungsermächtigung*). The person granting discretionary power to exercise the voting rights must still include the securities in his own (future) disclosures.

- **Holdings by a group of companies (*Konzern*):** The holding by a group of companies no longer qualifies as a group (*cf.* former article 10(2)(c) SESTO-FINMA which slightly contradicted article 9(3)(b) SESTO-FINMA). Under the revised law, such case qualifies as an *indirect* acquisition. In the disclosure notice, the direct shareholders (group companies) and the beneficial owner (in most cases the holding, possibly the controlling shareholder) must be named, together with the total number of voting rights controlled by the beneficial owner.
- **Usufruct:** As a consequence of the abolishment of the former article 13 SESTO-FINMA, the person granting a usufruct (*Nutzniessung*) may no longer consider the underlying shares as sold but must report those shares while the person benefiting from the usufruct must, if entitled to exercise the voting rights with full discretion, report based on article 120(3) FMIA.
- **Longer notification period in case of inheritance:** In case of an acquisition by inheritance, the notification period was extended to twenty trading days (as compared to four trading days in standard scenarios according to article 24(1) FMIO-FINMA).
- **No disclosure of holding chain:** Under the revised law, it is no longer required to disclose the entire holding chain. Disclosure of the direct acquirer and beneficial owner is henceforth sufficient.
- **Contact person:** Under the revised law, it is no longer required to publicly disclose the contact person and it is sufficient to merely report the details of such person (full name, address, telephone number and e-mail) to the disclosure office and the company (*cf.* article 23 FMIO-FINMA).
- **Address of legal entities:** Under the revised law, legal entities must no longer indicate the address (*cf.* article 22(1)(e) FMIO-FINMA).
- **Filing:** Filing by e-mail or facsimile is considered sufficient and it is no longer necessary to file the signed originals.
- **Reporting of changes:** The new article 16(2) FMIO-FINMA has eliminated certain inconsistencies in connection with the former article 21(4) SESTO-FINMA, which stipulated that any change in one of the reported facts had to be reported to the disclosure office and the company, which was inaccurate against the backdrop that a change in the number of voting rights was subject to reporting only if reaching or exceeding a threshold. The new article now includes a list of the relevant changes which technically do trigger a new disclosure obligation. Accordingly, also up-to-date figures as to voting rights have to be notified (even if no threshold has been reached or crossed).

Transitional Provisions for the Disclosure of Qualified Shareholdings

Disclosures made in accordance with the previously applicable law remain valid. Facts which occurred before the entry into force of the FMIA and its corresponding ordinances on 1 January 2016 and which have become subject to a disclosure obligation only based on the FMIA and FMIO-FINMA must be notified by 31 March 2016 (article 50(1) FMIO-FINMA). Facts subject to disclosure that occur after entry into force of the FMIO-FINMA may, up until 31 March 2016 and in a first step only, be filed in accordance with the previously applicable law if accompanied by a note to that effect in the disclosure notice. However, a separate disclosure notice in accordance with the new law must then be filed with the disclosure office and the company by 31 March 2016 (article 50(2) FMIO-FINMA).

Sanctions

The nature of the sanctions for violations of the disclosure rules remains unchanged (suspension of voting rights; prohibition to purchase further shares; fines; *cf.* article 144 *et seq.* FMIA.). The maximum fine in case of negligence was reduced from CHF 1 mio. to CHF 100,000.

Walder Wyss Ltd.
Attorneys at Law

Phone + 41 58 658 58 58
Fax + 41 58 658 59 59
reception@walderwyss.com

www.walderwyss.com
Zurich, Geneva, Basel, Berne, Lausanne, Lugano