
Being Listed: the consequences of the listing for the company and for the managers

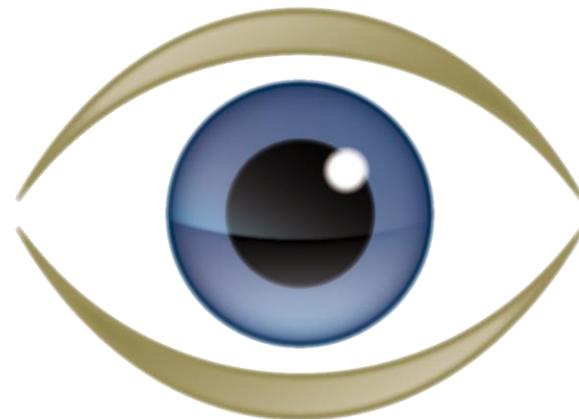
CAS in Compliance Management – University of Geneva

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9 October 2015

walderwyss attorneys at law

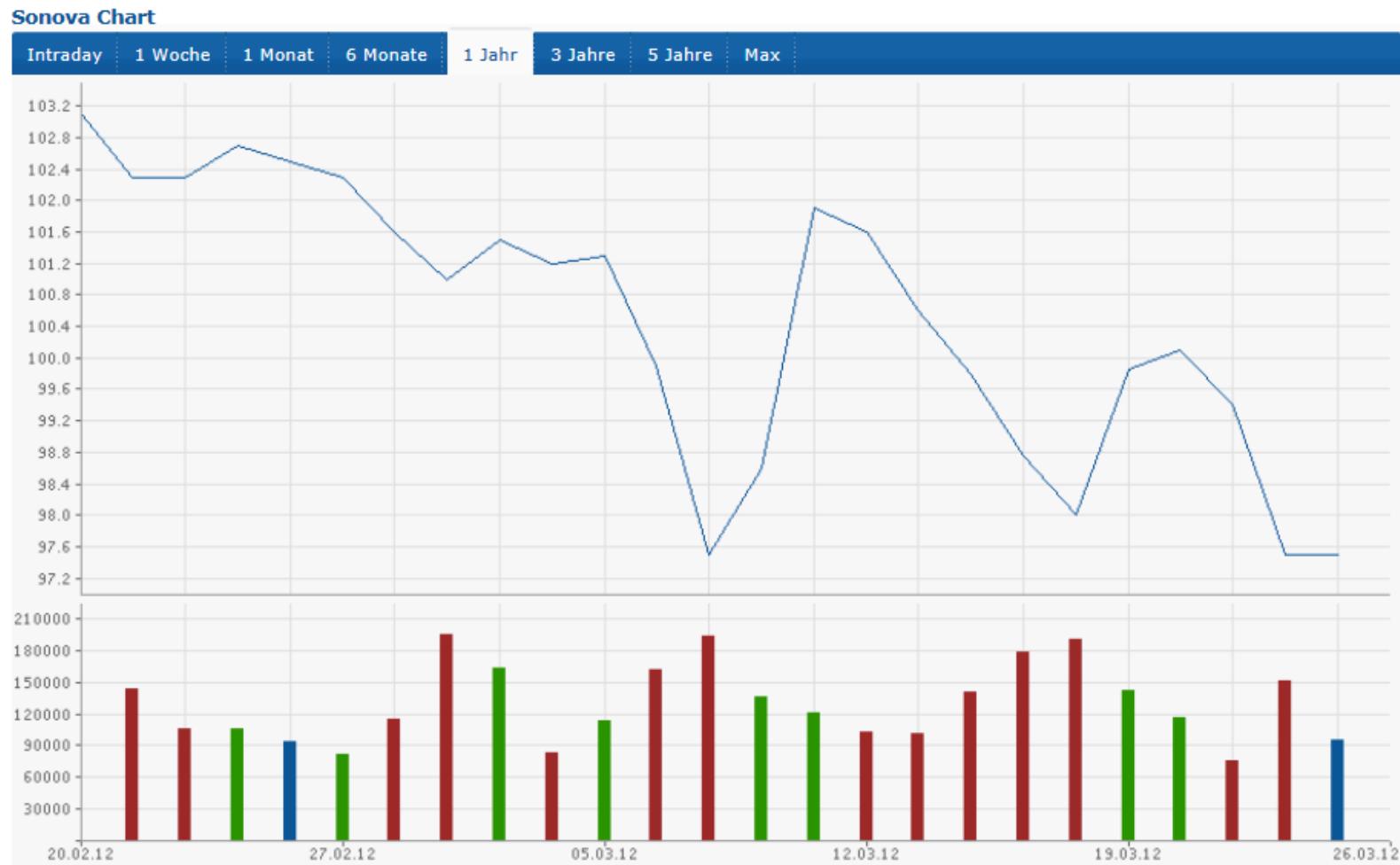
Welcome



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Ad hoc Publicity

Disclosure modalities (1b/3) – Case Sonova



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Obligation to notify the important shareholding (art. 20 SESTA)

Public offers for investments (Art. 22 ff. SESTA)

Listing and relating obligations

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Listing and relating obligations

Principles

- IPO vs Listing:
 - Primary market is in principle not regulated
 - Secondary market is highly regulated
- Object of the listing:
 - Securities are listed, not the issuing company
 - Each category of securities is listed separately (art. 18 Listing Rules)
- Listing:
 - Means that all conditions required for being admitted to the negotiation on a certain market are fulfilled

Listing and relating obligations

Obligations for maintaining the listing (SIX)

Recurring obligations	Event-driven obligations
Regular reporting obligations Technical and administrative information on the issuer and the securities (e.g. information on dividends)	Ad hoc publicity Information on potentially price-sensitive facts (e.g. significant changes in profit, restructuring, takeover offers)
Financial reporting – Annual report publication – Interim report publication	Disclosure of management transactions Reporting of all relevant transactions on the exchange by the board of directors and executive committee
Corporate governance – Information on the governance and management of the company (e.g. composition and compensation of the board of directors and executive committee) – “Comply or explain” rule	Disclosure of shareholdings Compulsory reporting by individuals and groups attaining, exceeding or falling below the thresholds of 3 %, 5 %, 10 %, 15 %, 20 %, 25 %, 33½ %, 50 % or 66⅔ % of voting rights

Ad hoc Publicity

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Ad hoc Publicity

Legal basis

- Art. 53 Listing rules (LR):

Section 1:

«The issuer must inform the market of any price-sensitive facts which have arisen in its sphere of activity. Price-sensitive facts are facts which are capable of triggering a significant change in market prices.»

- Directive ad hoc Publicity (DAH)
- DAH Commentary

Ad hoc Publicity

Purposes of the regulation

- Protection of the **investors**
 - Transparency concerning the issuer
 - Principle of equal treatment for all participants («level playing field»)
- Protection of the **system**
 - Protection of capital market
 - Free market of offer/demand of capitals
- Prevention of exploitation of insider information (**insider trading**)

Ad hoc Publicity (Un)level playing field



Ad hoc Publicity

Potentially price-sensitive facts

- Facts
 - They must be **more than mere rumours**, ideas, third-party earnings estimates, opinions, planning options or intentions (the difference between intent and decision can be very slight)
 - However, depending on circumstances, the definition includes facts which are to be expected **«in the ordinary course of events»** respectively **«with a high probability»**
 - The fact must occur **in the issuer's sphere of activity**
- Potentially price-sensitive
 - **Relevance**
 - An event must capable of affecting the average market participant in his investment decision
 - There is no complete list of relevant circumstances
 - According to SIX there are no value thresholds or percentages, but the test must be made on case-by-case basis
 - There is **no need for an actual change** in the price (rise or fall)

Ad hoc Publicity

Practical cases (1/2)

- In principle **not subject to the ad hoc publicity** obligation because they do not occur in the issuer's sphere of activity (external effect):
 - general market data (economic policy or macroeconomic developments, exchange-rate fluctuations, a trade embargo), the launch of a rival product, buy or sell recommendations from analysts, etc.
- In **exceptional cases**, facts not occurring in the issuer's sphere of activity may fall under the ad hoc publicity obligation when they have a direct effect on the issuer's internal operations
 - decisions by an antitrust or supervisory authority or a court, termination of an important contract by a key business partner, the bankruptcy of such a partner or its need for financial restructuring
- The following facts shall be **usually disclosed**:
 - Structural changes (mergers, acquisitions)
 - Significant M&A transactions
 - Changes in capital
 - Shifts in the shareholder structure
 - Personal changes in the BoD or in the Executive Board
 - Financial figures, profit warning, substantial changes in profit (profit hike or profit collapse)

Ad hoc Publicity

Practical cases (2/2)

Profit warning

- Issuer corrects its own forecast regarding financials
- Expected figures **deviates appreciably from prior forecast**
- Timing of publication: as soon as issuer knows that financials results are likely to significantly deviate from the forecast

Profit collapse/hike

- Issuer has not published forecast on financials
- Expected figures **are significantly lower or higher than prior year**
- Timing of publication: as soon as issuer knows of likely deviation

Ad hoc Publicity

Disclosure modalities (1/3)

- Content: “**True, clear and complete**”
- Timing: **as soon as issuer is aware** of main points about the fact / **outside trading times**
 - Decision to elect a new member of the BoD (not after the next general meeting of shareholders)
 - Conclusion/termination of an employment agreement (not after starting of work)
 - Timing difficult in case of profit warning (see Sonova-case) and in case of profit collapse/hike
 - Generally for financials: once the report has been signed off by the relevant body
- Principle of **equal treatment**
 - For all participants on the market (publicity)
 - Simultaneous information (coordination of media-/analyst-phonecalls)

Ad hoc Publicity

Disclosure modalities (1a/3) – Case Sonova



Media Release

10 July 2012

SIX Exchange Regulation
SIX Swiss Exchange Ltd
Selnaustrasse 30
P.O. Box 1758
CH-8021 Zurich
www.six-exchange-regulation.com

SIX Swiss Exchange fines Sonova Holding Ltd.

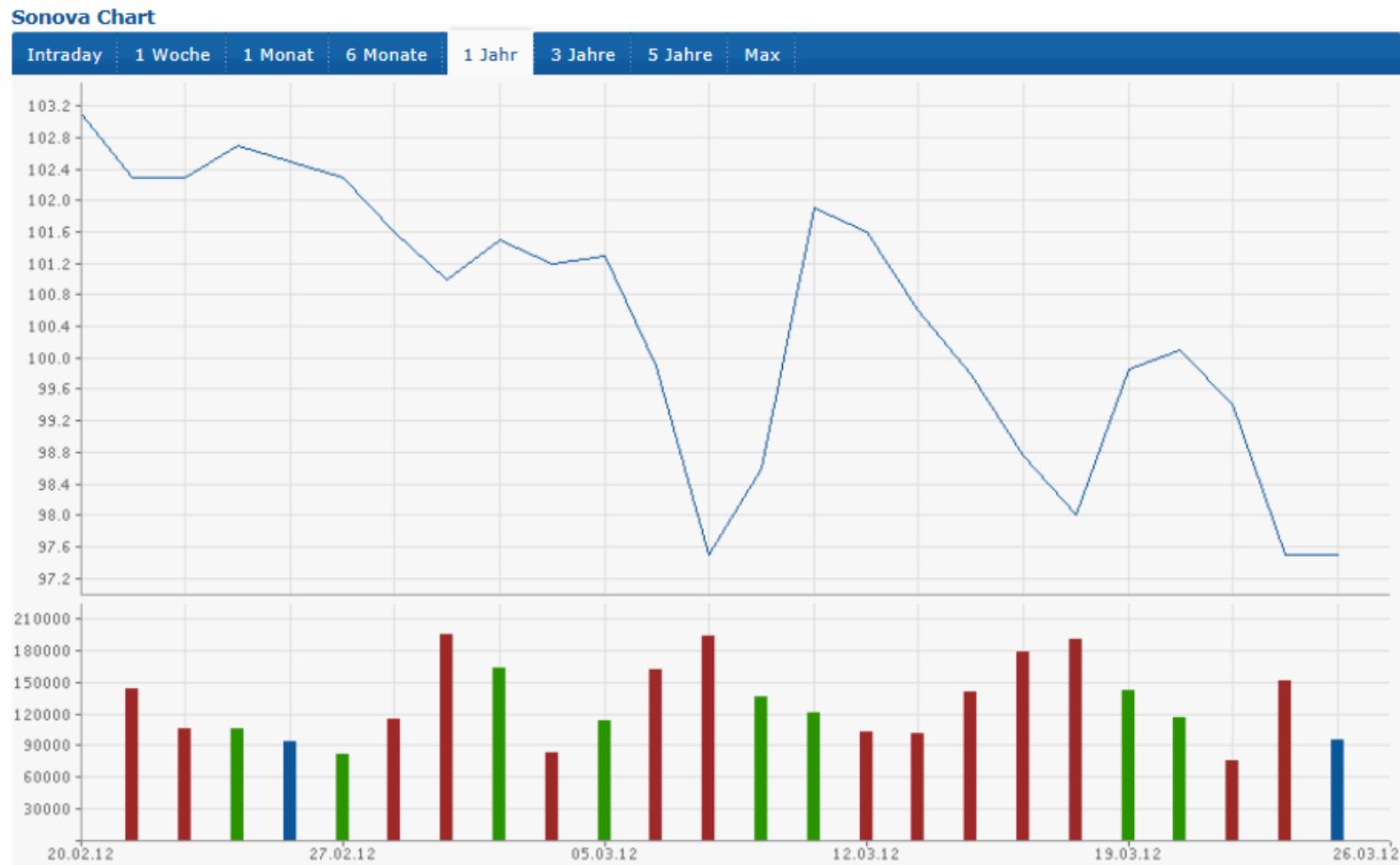
The SIX Swiss Exchange Sanction Commission has fined Sonova Holding Ltd. CHF 2 million for breach of the rules on ad hoc publicity.

According to the provisions on ad hoc publicity, an issuer must inform the market of any potentially price-sensitive facts as soon as it itself becomes aware of the main points of such information. If the company has issued any public forecasts in relation to financial information, it must correct these by means of an ad hoc notice as soon as it is aware that its financial results are likely to significantly deviate from the forecasts. In such a case, the company must issue a so called profit warning.

Sonova Holding Ltd. disclosed a profit warning on 16 March 2011. However, the Sanction Commission has established that the company was too late with its disclosure of this profit warning. According to the decision of the Sanction Commission, the profit warning should have been issued by 4 March 2011 at the latest, i.e. 12 days earlier. This late disclosure was found to have violated the rules on ad hoc publicity.

Ad hoc Publicity

Disclosure modalities (1b/3) – Case Sonova

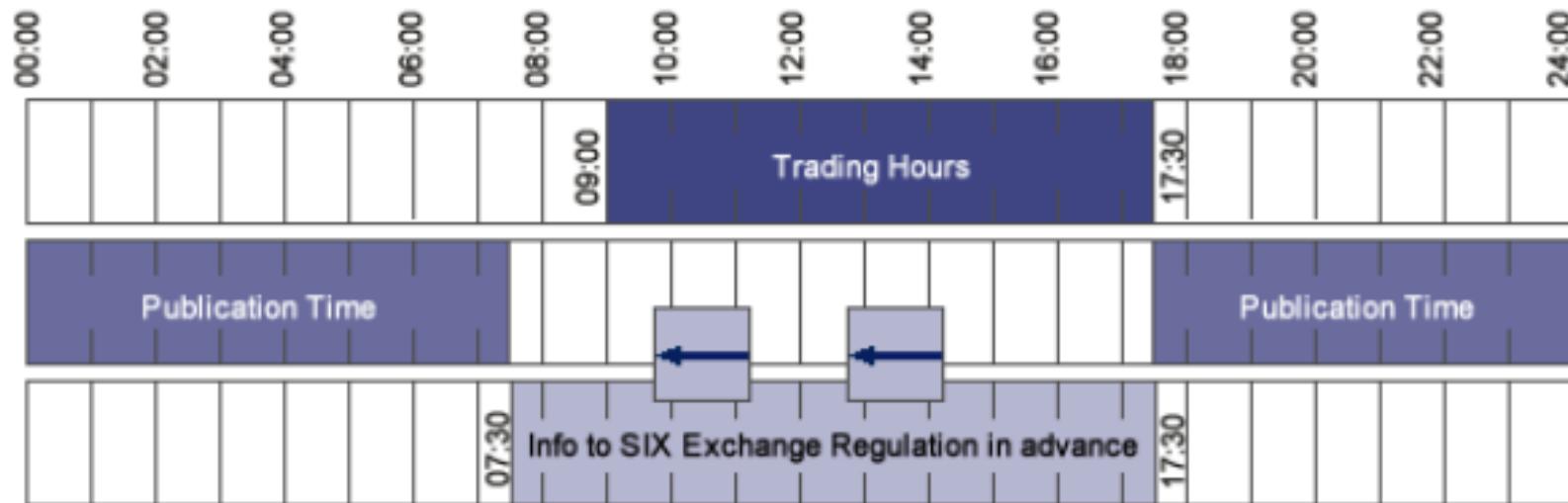


Ad hoc Publicity

Disclosure modalities (2/3)

- **Notice distribution**
 - SIX (90 minutes ahead of time if published during trading hours)
 - at least two electronic information systems widely used by professional market participants (e.g. Bloomberg, Reuters, Telekurs)
 - at least two Swiss newspapers of national importance (free newspapers and the SHAB are not sufficient)
 - all interested parties upon request (Push-System / Pull-System)
- **Email distribution** (Push-System)
 - By indicating that service is available on the website
 - No need to indicate that it is an «ad hoc» information
- **Issuer Website** (Pull-System)
 - there is no need to distinguish between ad hoc notices and “normal” press releases
 - However, if an issuer does make such a distinction, he must ensure that all media releases with potentially price-sensitive content appear in the list of ad hoc notices
 - Available for 2 years

Ad hoc Publicity Disclosure modalities (3/3)



Ad hoc Publicity

Postponement of disclosure

Art. 54 LR:

«The issuer may postpone the disclosure of a price-sensitive fact, if:

1. the fact is based on a plan or decision from the issuer; and
2. its dissemination might prejudice the legitimate interests of the issuer.

The issuer must ensure that the price-relevant fact remains confidential for the entire time that disclosure is postponed. In the event of a leak, the market must be informed about the fact immediately, in accordance with the rules on disclosing price-sensitive information.»

- The **postponement is not possible** for financials, profit warning, substantial changes in profit (profit hike or profit collapse) and dismissal of members of the BoD (as not decided by the issuer)
 - **Weighting of issuers interests vs. public interests** (always!)
 - Leak of information: restricting the number of people entrusted with the information to an absolute minimum (**need to know - principle**)
 - Prepare a **contingency press release**
-

Ad hoc Publicity in M&A transactions (1/3)

- M&A transaction **as fact?**
 - Internal planning phase: only exceptionally (change of strategy)
 - Structuring phase: only exceptionally (documentation of the transaction)
 - Contact: no, as long as it is exploratory only; if it is focused, it depends
 - Beginning of negotiations (LoI, NDA, Due Diligence, Transaction Agreement)
 - Signing
- **Knowledge** of the fact
 - when a person of the executive board or a non-executive director is aware of the main points of the fact

Ad hoc Publicity in M&A transactions (2/3)

- M&A transaction **within field of activity** of the company?
 - Hostile, from a target point of view
 - In case of non requested takeover bid: no, because the change of the shareholders does not affect directly the company (controversial)
 - Decision of refusal: no (but possibly for the potential buyer)
 - Bidder's renounce: no
 - Friendly: yes
- **Potentially price-sensitive?**
 - SIX: there are no percentage data, only some theoretical guidelines
 - Approximate values from the scholars (Appenzeller, Schenker): **5% revenues, 10% EBIT, 10% own capital, 10% balance sheet sum**
 - Other: current information policy, surprise effect, volatility, liquidity, signalling effect, perception of the market

Ad hoc Publicity in M&A transactions (3/3)

Postponement of disclosure

- Plan or decision of the issuer
 - Just as long as the issuer can decide on its own whether to pursue or discontinue the fact
 - As a consequence: disclosure has to occur **latest at Signing** (maximal time limit)
- Legitimate interests of the issuer
 - Shall be taken into account against the interests of disclosure of the market participants
 - Are legitimate just **as long as there is uncertainty**, i.e. pre Signing
- **Comprehensive Confidentiality** (best practice):
 - Need-to-know principle
 - Obligation of confidentiality for the ones who know
 - Standstill agreement (Insider)
 - Drafting of a contingency press release
 - Market monitoring by the issuer
 - Focus on future investigations (insider lists, ecc.)
 - In case of leak of information: the postponement ends; difficult to distinguish from mere rumours

Management compensations and management transactions

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Management compensations

Legal basis

- Art. 663b^{bis} CO
- Ordinance against excessive compensation with respect to listed companies - “OaEC” (since 1.1.2014 – Consequence of “Initiative Minder”)
- Art. 663c para 3 CO
- Directive on Information relating to Corporate Governance (DCG)
- IFRS 2 and IAS 24

Management compensations

Purpose, scope of application

- Purpose
 - To guarantee a **complete information** of the investor
 - **Transparency** concerning the compensation of the members of the BoD and of the executive board
- Scope of application
 - Swiss Ltd., whose shares are listed on a stock exchange
 - Compensations: remunerations, wages, bonuses, credit items, tantièmes, stocks
 - Benefits in kind, allocation of stocks, conversion and option rights, severance payments
 - Guarantees, indemnity obligations, pledges in favour of third parties and other securities, waiver of claims

Management compensations

Affected body / persons pursuant to art. 663b^{bis} CO / OaEC

- Members of the **BoD** of the company
- Members of the **executive board** of the company
- Members of the advisory board
- **Former members** of the BoD, of the executive board or of the advisory board, if the compensation is **connected with their former activity** in a body of the company or if they are not customary in the market
- **Persons who are related** to the persons mentioned in subparagraphs 1-4, if the compensation is **not customary** in the market (**very broad!**)

Compensations of the management

Modalities

- Current and former members of the BoD
 - Total amount
 - Amount paid to each member, indicating name and function
- Current and former members of the executive board
 - Total amount
 - The highest amount paid to a member, indicating name and function
- Related persons
 - Total amount of all compensations paid to persons related to members of the BoD, executive board and advisory board; the names do not need to be disclosed.

Management compensations

Duty to disclose pursuant to art. 663 b^{bis} CO / art. 13 ff. OaEC

Concerned Compensations (not exhaustive list)

- Fees, wages, bonuses, and credit notes
- Profit sharing, turnover participations and other participations in the business result
- Benefits in kind
- Allocation of stocks, conversion and option rights
- Severance payments
- Guarantees, indemnity obligation, pledges in favour of third parties and other securities
- Waiver of claims
- Payments establishing or increasing claims to benefits from pension plans
- Any remuneration for additional work
- The origin can be **direct or indirect** (e.g. via Group companies / third parties)
- The **legal nature / bases** irrelevant

Management compensations

Duty to disclose pursuant to art. 663 b^{bis} CO / art. 13 ff. OaEC

Loans and credits

- All **outstanding** loans and credits granted to the members of the board of directors, the executive board or the advisory board
- Loans and credits granted to former members of the board of directors, the executive board and the advisory board, only if under conditions which are **not customary** in the market,
- Loans and credits granted to related persons, only if under conditions which are **not customary** in the market

Management compensations

Duty to disclose pursuant to art. 663 b^{bis} CO / art. 13 ff. OaEC

Control of compliance

- So far: All information shall be disclosed in the notes to the annual report
- New: Art. 13 OaEC - **Written compensation report** (instead of notes)
- Art. 17 OaEC - Written compensation report shall be reviewed by the auditor (check of compliance with the law and OaEC)

Excursus: retribution has to be approved by GSM

> impact on employment agreements.

Management compensations

Duty to disclose pursuant to art. 663 b^{bis} CO / art. 13 ff. OaEC

Written Compensation Report (possible structure)

1. Introduction
2. Description of the compensation principles
3. Organisation and competence for determining the compensation
4. Description of the compensation elements (BoD / Management)
5. Compensations to be disclosed
6. Relationship compensation – performance (“pay for performance”)
7. Disclosure on shareholdings

Management compensation

Excursus: art. 663c para 3 CO (disclosure on shareholdings)

According to art. 663c para 2 CO only important shareholdings shall be disclosed (>5% of voting rights). Additional disclosure duties arise from art. 20 SESTA (threshold 3% of voting rights), but reasons and modalities are different.

Pursuant to art. 663c para 3 CO shall be disclosed in the notes to the annual report:

Shareholdings in the company as well as conversion and option rights

- **Of each member** of the BoD, of the executive board and of the advisory board
- Including participations **of related persons**,
- Including **name and function** of such member

Compensations of the management

	Compensations (663b ^{bis} s. 2)	Loans and credits (663b ^{bis} s. 3)	What shall be disclosed? (663b ^{bis} para 4 and 5)	Disclosure of shareholdings, conversion and option rights (663c para 3)
Current members of the BoD	unlimited	Granted and not refunded yet	Total amount and amount attributed to <u>each member</u> , including name and function	Each member, including related persons
Former members of the BoD	<u>Only if</u> the compensation is connected with their former activity in a body of the company or if it is not customary in the market	<u>Only if</u> the conditions are not customary in the market		n.a.
Current members of the executive board	Unlimited	Granted and not refunded yet	Total amount and <u>highest amount attributed to a member</u> indicating name and function	Each member, including related persons
Former members of the executive board	<u>Only if</u> the compensation is connected with their former activity in a body of the company <u>or</u> if it is not customary in the market	<u>Only if</u> the conditions are not customary in the market		n.a.
Current members of the advisory board	Unlimited	Granted and not refunded yet	Total amount and amount attributed to <u>each member</u> , including name and function	Each member, including related persons
Former members of the advisory board	<u>Only if</u> the compensation is connected with their former activity in a body of the company <u>or</u> if it is not customary in the market	<u>Only if</u> the conditions are not customary in the market		n.a.
Related persons	<u>Only if</u> the conditions are not customary in the market	<u>Only if</u> the conditions are not customary in the market	Separate declaration, no need to disclose the name of the related person	Each person related to a current member of the BoD, of the executive board and of the advisory board

Management transactions

Legal Basis

- Art. 56 LR
- Directive Management Transactions (DMT)
- Directive Electronic Reporting and Publication Platforms (DERP)
- Commentary to art. 56 LR and DMT (Commentary MT)

Management transactions

Purpose, scope of application

- Purpose
 - Promotion of a **complete information** of the investor
 - Contribution to prevent and prosecute **market abuses**
- Scope of application
 - Issuer: principal quotation at SIX (even non-Swiss Ltd.)
 - Persons in charge of disclosure: BoD and executive board

Management transactions

Persons in charge of disclosure

- Current members of the BoD and of the executive board
- The **issuer** must ensure that such persons comply with their obligation to disclosure and must take measures in case of breach (Art. 2 DMT).

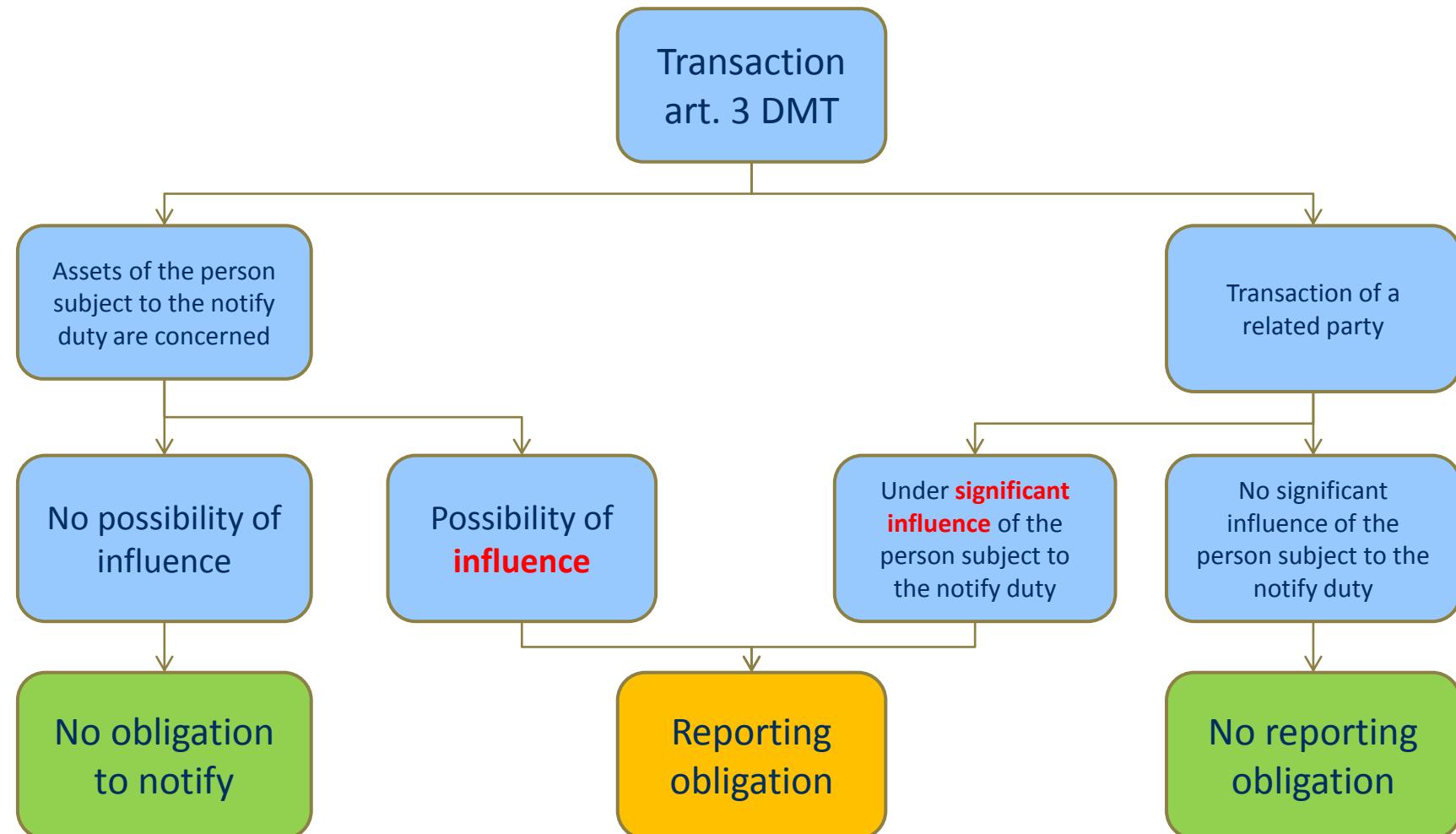
Management transactions

Art. 4 DMT Reportable transactions

- The reporting obligation covers :
 - 1) equities or similar **shares** in an issuer;
 - 2) conversion, purchase or sale **rights** that provide for or permit actual delivery with rights as per point 1, or conversion, purchase or sale rights from the issuer;
 - 3) financial **instruments** that provide for or permit a cash settlement and other contracts for difference whose performance depends on rights under points 1 or 2;
- Financial instruments under para 1 point 3, for which less than one third of performance is dependent upon rights under para 1 points 1 and 2, are not subject to the reporting obligation.
- An issuer's transactions in its **own equity securities or related financial instruments** are **not** subject to the reporting obligation.

Management transactions

Reportable transactions



Management transactions

Modalities of reporting obligation

- Content: name, function, type of transaction (purchase, sale, granting), total number, nature and ISIN of the securities , total value of the transaction, etc.
- Timing:
 - The person subject to the notify duty must report the **information to the issuer** through a declaration **within 2 trading days**
 - The **issuer must report** the information to SIX **within 3 trading days** of receiving the notification itself
- The issuer passes on the notifications using the electronic reporting platform, publications occurs on the SIX website

Management transactions

Case Credit Suisse



Media Release

23 December 2011

Credit Suisse Group Ltd receives a reprimand

SIX Exchange Regulation has issued Credit Suisse Group Ltd with a reprimand for breach of the rules governing the disclosure of management transactions.

The company was found to have breached the rules by notifying and publishing a management transaction involving 1,400 registered shares 18 trading days late.

A non-executive member of the Credit Suisse Group Board of Directors instructed Credit Suisse Group Ltd to sell 1,400 Credit Suisse Group shares held in his custody account. A department within the company was responsible for the administration of the account of the person concerned. As the same department caused the sale of the shares, Credit Suisse Group Ltd was already aware of the existence of a reportable management transaction at the time that the transaction was executed. Yet notification of the sale was still delayed. Credit Suisse Group Ltd declared that the Board member had failed to follow the company's internal procedures for reporting management transactions, which resulted in delayed notification and publication of the transaction.

However, on completing its investigations SIX Exchange Regulation found that Credit Suisse Group Ltd already had knowledge of the reportable transaction when it was executed. Given that the transaction was carried out by a department within Credit Suisse Group Ltd, knowledge of the transaction must be imputed to the company. Accordingly, the company could and ought to have reported and published the transaction within three trading days as prescribed in the Exchange's rules.

By way of mitigation, it was acknowledged that the internal reporting system set up by the company was generally effective, and that reasonable efforts had been made to ensure compliance with the rules governing the disclosure of management transactions. It was also acknowledged that no sanction had been imposed against Credit Suisse Group Ltd in the last three years.

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Overall the breach committed by the company was held to have been negligent, with the breach defined as minor. On these grounds, SIX Exchange Regulation issued Credit Suisse Group Ltd with a reprimand.

Obligation to disclose management transactions

The disclosure of management transactions promotes the provision of information to investors and contributes to the prevention and prosecution of market abuse.

Issuers with a primary listing on SIX Swiss Exchange have a number of obligations in relation to the disclosure of management transactions. Issuers must ensure, for example, that members of the Board of Directors and Executive Board notify the issuer of any transactions involving the issuer's equity securities, or related financial instruments, within two trading days. Issuers are also required to report any management transactions notified to them to SIX Exchange Regulation and to publish such information within three trading days.

Further information on the requirements for disclosing management transactions is available at:
http://www.six-exchange-regulation.com/obligations/management_transactions_en.html

Published notifications of management transactions are available on the SIX Exchange Regulation website at:
http://www.six-exchange-regulation.com/obligations/management_transactions/notifications_en.html

Should you have any questions, please feel free to contact Alain Bichsel, Head Media Relations.

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SIX Exchange Regulation
SIX Exchange Regulation performs the functions assigned under Swiss federal law and enforces and monitors compliance with the rules laid down by the Regulatory Board. SIX Exchange Regulation imposes sanctions in so far as it is authorised to do so by the regulations, or submits sanction requests to SIX Swiss Exchange's Sanction Commission.

Other reporting / communication obligations

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Other reporting/communication obligations

Legal Basis

- Swiss federal ordinance on recognised financial reporting standards (VASR)
- Art. 49 ff. LR
- Directive on Financial Reporting (DFR)
- Directive on Information relating to Corporate Governance (DCG)
- Circular SIX N. 1 Reporting Obligations Regarding the Maintenance of Listing (CIR1)

Other reporting/communication obligations

Recurring reporting - financial reporting

Annual financial reporting

- Annual report (annual accounts and audit report)
- within **4 months** of the end of the financial year (!)

Interim financial reporting

- Obligation of **biannual balance sheets**
- **Optional** quarterly balance sheets
- No obligation of audit or review

Accounting standard pursuant to art. 6 DFR

- IFRS (for all standards)
- Swiss GAAP FER (Domestic Standard und Standard for real estate companies)
- US GAAP (Main Standard, Domestic Standard, Standard for investment companies)
- IFRS are very expensive and complicated: change in favour of Domestic Standard? (e.g.: Swatch, Publigruppe)

Other reporting/communication obligations

Recurring reporting – Corporate governance

- The rules on corporate governance require issuer to publish **key information on the management** of the company
- The following information has to be provided to the public:
 - Group's organizational structure, including all subsidiaries and details of significant shareholders
 - Composition of the BoD (with brief CVs)
 - Composition of executive board (with brief CVs)
 - Compensation paid to the BoD and executive board (see above)
 - Shareholders' participation rights
 - Auditing
 - Change of control and defense measures
- Information has to be disclosed in the **annual report**
 - Principle of “**comply or explain**”

THANK YOU



Davide Jermini studied economics at the University of St. Gallen (lic. oec. HSG, 1992) and law at the University of Basle (lic. iur., 1995; magna cum laude). He was admitted to the Ticino bar in 1999 and to the Ticino notary society in 2000. He is mainly active in the fields of general banking & finance (including regulatory issues), corporate and commercial law as well as M&A. Moreover, he advises on employment law issues and real estate transactions. He joined Walder Wyss in 2013 as a partner after having worked 5 years for a major international business law firm in Zurich and after having been a partner in Zurich and Lugano based law firms for 8 years. He regularly publishes and lectures in his fields of expertise.

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