July 2021

Newsletter No. 153

Revised SIX rules on ad hoc publicity effective as of 1 July 2021:

The new rules of the SIX Swiss Exchange require, among other points, that any ad hoc announcement be labelled as such and that certain internal rules and procedures regarding the confidentiality of price-sensitive information be adopted. The new explicit reliance on the issuer's discretion when deciding based on proper procedures provides the basis for a regulatory «business judgment rule», protecting the issuers from catch-22 situations and counterproductive overregulation. So-called *per se* reportable events triggering disclosure irrespective of their materiality are mostly abolished. Issuers must carefully consider whether to publish an ad hoc announcement or not, even more so under the revised rules. This Newsletter discusses the main impacts on issuers.

walderwyss attorneys at law

Revised SIX rules on ad hoc publicity effective as of 1 July 2021

The new rules of the SIX Swiss Exchange require, among other points, that any ad hoc announcement be labelled as such and that certain internal rules and procedures regarding the confidentiality of price-sensitive information be adopted. The new explicit reliance on the issuer's discretion when deciding based on proper procedures provides the basis for a regulatory «business judgment rule», protecting the issuers from catch-22 situations and counterproductive overregulation. So-called *per se* reportable events triggering disclosure irrespective of their materiality are mostly abolished. Issuers must carefully consider whether to publish an ad hoc announcement or not, even more so under the revised rules. This Newsletter discusses the main impacts on issuers.

The revised SIX rules

On 31 March 2021, SIX Exchange Regulation **(SER)** announced the revision of the rules on ad hoc publicity. In essence, the regime governs the obligation of issuers listed on the SIX Swiss Exchange **(SIX)** to inform the market about materially price-sensitive facts that have arisen in their sphere of activity. Most of the new rules enter into force on 1 July 2021.

Said revision concerns the Listing Rules (**LR**, revised as **revLR**), the Directive on Ad Hoc Publicity (**DAH**, revised as **revDAH**) and the Directive on Corporate Governance (**DCG**, revised as **revDCG**) which have been subject to editorial as well as material changes. In addition, on 30 April 2021, the Issuers Committee of SER's Regulatory Board issued Circular no. 1 (**Circular No. 1**) which specifies the new rules, accompanied by Notification No. 3/2021 of SER's Regulatory Board of the same date. Furthermore, SER published related FAQs, also on 30 April 2021. The current commentary of SER on the Directive on Ad Hoc Publicity of 2011 is expected to be revised by the end of 2021.

The following sections discuss the main changes, which are:

1. the obligation to label ad hoc announcements as such **(«flagging»)**, combined with **a ban on abusive marketing announcements** labelled as ad hoc announcements, and to post them in a separate section or filter on the issuer's website, chronologically listed according to the dates of their distribution for three years (instead of two years);
2. the requirement of **internal regulations and procedures** regarding the confidentiality of price-sensitive information and the order of competencies with regard to ad hoc publications in general;
3. the abolition of the dogma of ***per se* reportable facts**;
4. **harmonization of terminology** with Swiss and EU capital market law, around the definition of price-sensitive facts, including a transition of the **materiality standard** for price-sensitivity from the DAH to the revLR, changes which are meant to be editorial only, *i.e.* not supposed to have any legal impact;
5. further changes, such as:
   - the requirement **to make a telephone call to the SER** in advance in case of any ad hoc publication during trading hours;
   - the obligation to submit ad hoc announcements to the SIX through the **CONNEXOR reporting platform** (expected to enter into force as of 1 October 2021); and
   - the obligation to **disclose general blackout periods in the annual corporate governance report.**

Flagging

Under the revised rules, ad hoc announcements must be labelled as «ad hoc announcement pursuant to Art. 53 LR» (so-called **«flagging»**). The classification must be made in a clearly visible manner at the top of the announcement. This means, in turn, that all price-sensitive information subject to the ad hoc disclosure obligation must be published in the form of a duly flagged ad hoc announcement.

In addition, an ad hoc announcement must show the **date** of its public distribution and be easy to find as well as **chronologically ordered** on the issuer website in a **separate section** or via a **web filter**. It must be available on the website of the issuer for **three years** (instead of two years under the former regime). The new rules do not apply to announcements published before 1 July 2021.

Pursuant to Circular No. 1, **pure marketing announcements** labelled as ad hoc announcements may be sanctioned by the Sanction Commission for breach of the ad hoc publicity obligation. The ban on abusive marketing announcements in the form of an ad hoc publication is in line with international standards (*cf.* art. 17(1) subsection 2 of the Market Abuse Regulation (EU) No 596/2014). While the ban on abusive marketing was expressly and separately stated in the first draft of the revLR, it is now only mentioned in the Circular No. 1.

Taking into account the issuer's discretion in assessing the price-sensitivity, an abuse of flagging may only be assumed if an ad hoc announcement is made with the **clear and obvious intention to abuse the flagging** for the purpose of marketing. The simple fact that an ad hoc announcement did not prompt any market reaction or that its price-sensitivity is not apparent should not automatically qualify as abusive flagging. In turn, there is no legal ground for implying that any information contained in an ad hoc announcement would be claimed by the issuer to be price-sensitive. Unless there is obvious intentional abuse of the form of an ad hoc announcement, no abuse of flagging should be assumed. This takes into account the fact that there is no objective measure of whether an announcement pursues marketing rather than information purposes, and that various market participants would typically have different views of it.

Any other understanding would create inconsistencies and legal uncertainty in relation to the **marketing regulation under the Swiss Financial Services Act (FinSA),** where advertising must be flagged as such (art. 68 sec. 1 FinSA) and communications about issuers or transactions are not deemed advertising, in particular if they are required by law, by the supervisory authorities or under the rules of a trading venue such as the SIX rules on ad hoc publicity (*cf.* art. 95 sec. 2 letter b of the Financial Services Ordinance, FINSO).

For the rest, the ban on abusive marketing essentially replicates the general formal requirement under the DAH that ad hoc announcements must be true, clear and complete: in line with the purpose of the ad hoc publicity, ad hoc announcements should contain the information required by law so as to enable investors to **quickly identify and process essential information**. The same wording can also be found in the «Emittentenleitfaden» (issued by the German Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)) with regard to the ban on marketing under art. 17(1) subsection 2 of the Market Abuse Regulation (EU) No 596/2014.

Given (i) the discretion of the issuer, (ii) the inherent legal uncertainty of a case-by-case assessment, (iii) the intrinsic risks of a hindsight bias, (iv) the fact that reality is rarely clear-cut and (v) ad hoc publicity is inherently instantaneous communication, it will be the task of the regulatory authorities to avoid placing issuers between the devil and the deep blue sea. The **reference to the appropriate discretion of the issuer, now expressly stated in the revDAH**, provides the legal basis for a recourse to a regulatory **«business judgment rule» protecting the issuers from catch-22 situations and counterproductive overregulation:** An informed, unconflicted decision of the issuer made based on proper internal procedures should not be questioned. Such an approach avoids decision deadlocks and other counterproductive backlashes on the information policy of the issuers and ultimately serves the information flow in the market and market transparency.

Note 13 of Circular No. 1 explicitly states: *«When assessing a possible violation, due consideration is given to the latitude of discretion and judgement that the issuer has in its ex ante qualification of the price-sensitive fact pursuant to Art. 4 para. 3 DAH.»* As a consequence, SER's longstanding practice that in case of doubt an ad hoc announcement should be made, is not and must not be overruled by the new flagging obligation and the ban on abusive marketing announcements.

At any rate, issuers must carefully consider whether to publish an ad hoc announcement or not, even more so under the revised rules.

Internal regulations and organization regarding price-sensitive information

The issuer may postpone ad hoc disclosure of price-sensitive facts, provided the confidentiality of the price-sensitive fact is ensured during the entire time of the postponement. In the event of an information leak, the issuer must immediately inform the market about the postponed fact.

The revLR now states that to ensure confidentiality of price-sensitive facts for which the postponement regime is invoked, adequate and transparent **internal rules and procedures** must be adopted. In particular, issuers are required to **take measures** as to limit the communication of price-sensitive facts to persons who need to know them for their specific tasks.

In addition to the need-to-know principle, Circular No. 1 mentions the following possible **«best practices»**: Access to confidential information should be granted only to the extent the information is actually needed. Persons having access to the confidential information should sign a confidentiality declaration (only required if no contractual or statutory confidentiality undertakings are in place). Furthermore, the issuer should keep an updated list of persons to whom it has disclosed the confidential information. In addition to measures to ensure confidentiality, measures to prepare for an immediate disclosure in accordance with the revLR in case of an information leak must be adopted.

What is new is not that such measures must be taken. Already under the former regime, adopting adequate measures to comply with the ad hoc disclosure obligation were part of this obligation, and certain precautions are required by insider law when material price-sensitive information is transferred (art. 128 letter b of the Swiss Financial Market Infrastructure Ordinance, FMIO). Rather, it is groundbreaking that the SIX regulations prescribe internal regulations with a specific content – the confidentiality of price-sensitive information – and that it is regarded as part of the ad hoc disclosure obligation to adopt them.

Furthermore, the revDAH newly requires the issuer to exercise its appropriate discretion with regard to ad hoc publications within the framework of an established order of competencies.

According to Circular No. 1, this means that the issuer must provide for a respective regime in the **corporate documents** – which requirement of specific content of the corporate documents and organization is again ground-breaking. This implies that issuers must **document decisions** regarding ad hoc publicity in line with internal procedures and corporate regulations of the competent committees, and that such decisions and internal regulations are duly **resolved.**

Although Circular No. 1 continues to adhere to the principle of organizational freedom, the current revision moves the **internal procedures, regulations and corporate documents more into the spotlight of SER**. It is worth mentioning that inadequate regulations or measures are not *per se* a sanctionable breach of the ad hoc disclosure obligation but only in connection with an omitted, delayed or otherwise deficient ad hoc announcement.

In view of the new rules on ad hoc publicity, issuers which have not yet done so are well advised to incorporate procedures and best practices with regard to the confidentiality of price-sensitive information into their internal regulations, generally check the order of competencies with regard to ad hoc publications and document the decision making on ad hoc publicity in line with the internal formal procedures.

No *per se* reportable facts (other than annual and interim reports)

According to the previous practice of the SER, certain facts always required ad hoc publication, irrespective of their price-sensitivity. Examples were changes in the issuer's board of directors or top management, the change of the issuer's accounting standard and the release of the annual and interim reports. This practice provided for some legal certainty for both, the issuers and the market participants.

The revDAH now explicitly states that whether a fact qualifies as price-sensitive must in any case be assessed on a case-by-case basis and that **no *per se* reportable facts exist**, except for the release of annual and interim reports. The former practice of SER regarding the processing and publication of financial information continues to apply.

The new rule essentially affects ad hoc announcements regarding the **appointment or resignation of directors and officers**. When deciding on whether a change in the board of directors or management of the issuer should be regarded as price-sensitive, the issuer may consider previous disclosure or whether a certain employee was mentioned in the corporate governance report as a member of the management board.

The new freedom and related loss of legal certainty will soon be neutralized by the only available method of determining hypothetical *ex ante* price-sensitivity: not financial mathematics but a **general consensus** on typical events which are customarily announced and regarded as material. This would typically be the case with the resignation (and/or new appointment) of a CEO or CFO.

Harmonization of terminology

One major motivation of the current revision of the rules on ad hoc publicity was to **align the terminology** regarding material price-sensitive facts with the Swiss Financial Market Infrastructure Act (FMIA) and the Market Abuse Regulation (EU) No. 596/2014.

Price-sensitive facts are newly defined as **«facts the disclosure of which is capable to materially influence the price of the securities»**. The term «potentially price-sensitive facts» is replaced by **«price-sensitive facts»**. The price-sensitiveness of a fact must still be assessed *ex ante* based on its hypothetical capability of having an impact on the market price. And the «average market participant» becomes a **«reasonable market participant»**. In both cases, the Regulatory Board of SER has declared that they are of purely editorial nature and hence without any legal impact.

Moreover, the (still somewhat hazy) description of **materiality** as exceeding the usual degree of price fluctuations has been transferred from the DAH to the revLR. Also with regard to the transition of the materiality standard from the DAH to revLR, no legal impact was intended.

Further changes

As mentioned, the revDAH expressly relies on the issuer's **appropriate discretion within the framework of an established order of competencies**. This provides the legal basis for a regulatory «**business judgment rule**» protecting the issuers from catch-22 situations and counterproductive overregulation: an informed, unconflicted decision of the issuer based on proper internal procedures may not be questioned.

On the technical side, issuers are now required to make a **telephone call to SER** in advance of any ad hoc publication if planned to be made during critical trading hours (*i.e.* between 9.00 AM (CET) and 5.40 PM (CET)) or later than 90 minutes before the start of trading. Previously, this was only required in the case of an information leak during a postponement of ad hoc publication.

Moreover, issuers of primary-listed equity securities will have to **use the electronic platform «CONNEXOR»** for the submission of ad hoc announcements to SIX. Unlike the other changes, this change is expected to enter into force only on 1 October 2021.

Finally, the revDCG requires issuers to **disclose general blackout periods**, *i.e.* regular trading restrictions before the publication of financial results in **the annual corporate governance report**. If the issuer does not disclose any blackout periods, it must provide a reasonable explanation (in line with the «comply or explain» principle). Extraordinary blackout periods, *e.g.* in connection with special projects, are exempt from this obligation. This new disclosure obligation may well have a standardizing effect on the heterogenous practices among the market participants.

Summary and conclusions

The **harmonization** of the terminology regarding material price-sensitive facts with the Swiss Financial Market Infrastructure Act (FMIA) and the Market Abuse Regulation (EU) No. 596/2014 is a positive signal towards the compatibility of the SER's rules with the national and international regulatory environment.

With regard to the new **obligation to label ad hoc publications and the related ban on abusive marketing announcements,** it will be the task of the regulatory authorities not to push the issuers into cornelian dilemmas but to rely on their **now expressly stated discretion** in terms of a regulatory **«business judgment rule»** protecting the issuers from catch-22 situations and counterproductive overregulation. This is in line with SER's longstanding proven practice according to which issuers may issue an ad hoc announcement in case of doubt.

Certainly, the simple fact that an ad hoc announcement did not prompt any market reaction or that its price-sensitivity is not apparent must never qualify as abusive flagging. Unless there is **obvious intentional abuse of the form** of an ad hoc announcement, any communication in the form of an ad hoc announcement should be regarded as such. The ban on abusive marketing essentially replicates the longstanding formal principles of truth, clarity and completeness of the ad hoc announcement.

Issuers should further check whether their **internal regulations** provide for sufficient **procedures and measures** related to the confidentiality of price-sensitive information the publication of which is postponed, and whether the **order of competencies** with regard to ad hoc publications are generally sound. Issuers should put more emphasis on documenting the decision-making process with regard to ad hoc publicity in line with the internal formal procedures.

As to the abolition of ***per se* reportable facts**, the new freedom and related loss of legal certainty will soon be neutralized by the only available method of determining hypothetical *ex ante* price-sensitivity: reliance on a general consensus on typical events which are customarily announced and regarded as material instead of financial mathematics. This would typically be the case with the resignation (and/or new appointment) of a CEO or CFO.

Therefore, issuers are well advised to apply additional care when deciding whether to make an ad hoc announcement or not.

The authors

Daniel Dedeyan
Prof. Dr. iur., LL.M. (Yale), Attorney at Law
Counsel
Direct phone: +41 58 658 53 16
daniel.dedeyan@walderwyss.com

Rafael Zemp
lic. iur., Attorney at Law, MBA Insead
Managing Associate
Direct phone: +41 58 658 57 93
rafael.zemp@walderwyss.com

Alex Nikitine
Dr. iur., LL.M., Attorney at Law
Partner
Direct phone: +41 58 658 56 32
alex.nikitine@walderwyss.com

Christian A. Schmid
MLaw, LL.M., Attorney at Law
Associate
Direct phone: +41 58 658 52 70
christian.schmid@walderwyss.com