



# Revised notices of the SIX disclosure office

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## Introduction

On 20 September 2018 the Disclosure Office of the SIX Exchange Regulation published useful guidance on its practice relating to certain provisions in the recently enacted Financial Market Infrastructure Act and the related implementing ordinance (the Swiss Financial Markets Supervisory Authority (FINMA) Financial Market Infrastructure Ordinance).

On behalf of FINMA, the disclosure office monitors and enforces compliance with the disclosure rules on significant shareholdings set out in the Financial Market Infrastructure Act and the FINMA Financial Market Infrastructure Ordinance and publishes its practice mainly by means of notices. The entry into force of the two federal laws has resulted in substantive amendments to some of the disclosure office's notices. The opportunity was also taken to:

- overhaul the notices on a formal basis; and
- confirm elements of the existing practice in writing.

The provisions on significant shareholding disclosure are relevant for investors which directly, indirectly or in concert with third parties acquire or dispose of shares or rights (ie, equity-linked instruments) relating to shares in a company with a registered office in Switzerland whose equity securities are listed in whole or in part in Switzerland, and thereby reach, fall below or exceed the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 33.3%, 50% or 66.6% of the voting rights.

This article provides a brief overview of the amendments.

## New reporting obligation in Financial Market Infrastructure Act

On the entry into force of the Financial Market Infrastructure Act, a new and separate reporting obligation was introduced: parties are now also subject to the reporting obligation if they have discretionary power to exercise voting rights (Article 120(3) of the act). The new obligation comes into play, for example, when beneficial owners give their asset managers power of attorney to exercise the voting rights at the annual general meetings at the asset managers' own discretion; however, this does not apply to one-off authorisations (Article 120(5) of the act).

The newly released Notice I/18 (Notification Duty of Person with Discretionary Power to Exercise Voting Rights Pursuant to Article 120(3) of the Financial Market Infrastructure Act) sets out details and modalities of such duties. In line with FINMA's practice, it specifies that the new reporting obligation applies to persons which, cumulatively:

- have discretionary power to exercise voting rights; and
- are outside the chain of control of the equity securities' beneficial owners.

Regarding the first point, the disclosure office explains that the delegated power requires not only the legal ability, but also the legal authorisation. The Disclosure Office exemplifies that, in particular, a person will have discretionary power to exercise voting rights where they:

- can exercise said voting rights without consulting the beneficial owner;
- are not bound by the proposals of the board of directors of the concerned company; and
- have no other instructions to follow.

Regarding the second point, the disclosure office concludes that as a consequence thereof, voting rights may be delegated freely within a group of companies (ie, inside a chain of control) without triggering notification duties.

Referring to Article 10(2) of the FINMA Financial Market Infrastructure Ordinance (in the version adopted after the partial revision of 2017), the disclosure office holds in Notice I/18 that, in case of direct or indirect control, the reporting obligation may alternatively be fulfilled by:

- the entity authorised for the discretionary execution of voting rights on a standalone basis; or
- the controlling person of said entity (ie, the so-called 'last link in the chain') on a consolidated basis.

Notice I/18 provides further instruction on how such notification forms must be marked.

In addition, in a somewhat related matter, Notice I/18 confirms the existing practice of the disclosure office that on pledge agreements regarding registered shares, usually no notification duty arises for either party solely by virtue of the pledge agreement, provided that and to the extent that the pledgee is not authorised to exercise voting rights.

Even though Notice I/18 provides useful guidance for compliance with the new reporting duties, some points remain unclear. First, the point in time when the obligation to notify is triggered is somewhat unclear. Notice I/18 holds that the obligation arises at "the time when such a discretionary authorisation to exercise the voting rights starts and may also actually be exercised at a general meeting". It is questionable though, whether this rule corresponds to the sense of Article 120(3) of the Financial Market Infrastructure Act with the consequence that market participants know only on the day of a meeting whether the exercise of voting rights has been delegated. Second, the alternatives regarding the reporting subject (ie, standalone entity or on a consolidated basis) complicates the filing of notifications (Article 22(2)(a)(2) of the FINMA Financial Market Infrastructure Ordinance) and might leave market participants with uncertainties.

### **Revision of existing notices**

The Financial Market Infrastructure Act and the FINMA Financial Market Infrastructure Ordinance resulted in amendments to existing notices. The disclosure office also took the opportunity to set out in writing some parts of the previously existing practice and formally revise all notices.

### ***Material amendments to existing notices***

*Notice I/09 (Fulfilment of the Notification Obligation within the Prospectus and Simplified Disclosure of Lock-Up Groups)*

The frequently consulted Notice I/09 on the fulfilment of the notification obligation within the prospectus

and the simplified disclosure of lock-up groups was partially amended. Most importantly, the reporting obligation relating to subscription rights was specified and, in confirming the existing practice, the notice now states that, like the original acquisition of subscription rights, the sale of originally acquired subscription rights does not trigger any notification obligation. Likewise, no disclosure obligation is triggered when a shareholder exercises in advance originally acquired subscription rights.

Further, according to the new definition of 'equity derivatives' in Article 15(1) of the FINMA Financial Market Infrastructure Ordinance, over-allotment options no longer trigger the disclosure obligation. Accordingly, the remarks on the reporting obligations in connection with over-allotment options were deleted from the notice.

Notably, with respect to lock-up groups, the revised notice states that, on expiry of the lock-up term, a reporting obligation arises in every case (ie, even if the termination date was disclosed in the original notification).

#### *Notice II/13 (Disclosure of Equity Derivatives)*

In order to align with the Financial Market Infrastructure Act and the FINMA Financial Market Infrastructure Ordinance, more substantial amendments had to be made to Notice II/13, which deals with the disclosure of equity positions through equity derivatives. At the same time, the definition of 'reportable instruments' was simplified and terms such as 'financial instrument' (now 'equity derivative') were changed.

The revised notice also contains guidance regarding the calculation of shareholdings in the form of derivatives with inextricably linked components that are mutually exclusive (eg, a collar). Further, the notice offers a simplified way for calculating percentages where the number of shares cannot be determined at the time of notification, which previously often led to disclosed shareholdings above 100%.

#### *Notice III/00 (Indirect Acquisition and Indirect Sale – Control over Legal Entities)*

Revised Notice III/00 provides more detailed guidance (including examples) regarding the term 'control'; however, in substance, the existing practice remains unchanged.

### **Formal amendments**

The disclosure office amended the following notices in a more formal or explanatory way:

- Notice III/13 (Fulfilling Disclosure Obligations when forming Groups, in Case of Changes in the Composition of the Group, and upon the Dissolution of Groups);
- Notice I/13 (Companies having their registered office abroad whose equity securities are mainly listed on SIX Swiss Exchange);
- Notice II/08 (Publication Duties of Issuers);
- Notice I/08 (Exemptions for Banks and Securities Dealers); and
- Notice III/99 (Calculation of Shareholdings).

### **Repealed notices**

Notice I/00 (Extent of Reporting Obligation for a Group/Group of Companies) and Notice II/99 (Asset Management and Custody Account Business/Nominees) were repealed on the grounds that:

- they are now part of the disclosure office's standing practice; and
- the Financial Market Infrastructure Act and the FINMA Financial Market Infrastructure Ordinance need no disclosure office supporting notices.

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