Revisiting shareholder disclosure duties in Swiss rights offerings

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As in other jurisdictions, under Swiss law there are specific requirements relating to the disclosure of shareholdings and the actions of shareholders for companies whose equity securities are listed in whole or in part in Switzerland, including on Switzerland's main stock exchange, the SIX Swiss Exchange Ltd. This update aims to revisit and provide some practical guidance on certain shareholder disclosure duties in the context of Swiss rights offerings.

Legal framework

According to Article 120 of the Financial Market Infrastructure Act and its implementing ordinances, the Financial Market Infrastructure Ordinance and FINMA Financial Market Infrastructure Ordinance, persons who directly, indirectly or acting in concert with other parties acquire or dispose of shares or purchase or sell rights relating to shares, and thereby reach, exceed or fall below a threshold of 3%, 5%, 10%, 15%, 20%, 25%, 33.3%, 50% or 66.6% of a company's voting rights (whether exercisable or not) must notify the company and SIX**(1)** of such acquisition or disposal in writing within four trading days.

Within two trading days of receipt of such notification, the company must publish such information through SIX's electronic reporting and publishing platform.

For purposes of calculating whether a threshold has been reached or crossed, shares, delegated voting rights and acquisition rights or obligations ('purchase positions') on the one hand and sale rights or obligations ('sale positions') on the other hand may not be netted. Rather, the purchase positions and the sale positions must be accounted for separately and may each trigger disclosure obligations if the respective positions reach one of the thresholds. In addition, actual share ownership and delegated voting rights must be reported separately from other purchase positions if it reaches one of the thresholds.

Furthermore, pursuant to Article 121 of the Financial Market Infrastructure Act and Article 12 of the FINMA Financial Market Infrastructure Ordinance, those who coordinate their conduct with third parties by contract or by any other organised methods with view to the acquisition or sale of equity securities or the exercise of voting rights are deemed to be acting in concert or as an organised group, which are also subject to a separate notification duty.

Such coordinated conduct is present if, among other things, a legal relationship exists for the purpose of acquiring, selling or restricting the sale of equity securities (ie, through lock-up arrangements). Such information must also be disclosed to the company and subsequently published on SIX's electronic reporting and publishing platform.

Shareholder disclosure duties

Capital increases

Pursuant to Article 652b(1) of the Swiss Code of Obligations in the context of capital increases

shareholders are entitled to pre-emptive rights. Such pre-emptive rights grant shareholders a claim to the proportion of any newly issued shares that corresponds to their previous holdings. In the context of a rights offering, this statutory requirement is satisfied through the granting of subscription rights to shareholders in proportion to their current equity interest in the company.

To the extent that shareholders receive the subscription rights as an immediate result of their previous proportionate shareholding in a company, according to the SIX Exchange Regulation, those shareholders are not subject to any disclosure requirements because the rights merely represent the legally foreseen consequence of a capital increase, and (provided that the shareholder exercises its subscription rights) after completion of the capital increase the shareholder's effective proportion of ownership in the company will not change.**(2)** Similarly, the issuer is also not subject to a disclosure obligation for any sale positions corresponding to the subscription rights.

In terms of shareholders whose equity ownership reaches, exceeds or falls below a given threshold value in connection with a capital increase (eg, as the result of a passive shortfall of a threshold value because the shareholders opted not to exercise their respective rights), the shareholders' disclosure obligations can be fulfilled in the listing prospectus according to SIX Exchange Regulation Official Disclosure Notice of 7 April 2009 ('SIX I/09').

However, this can be satisfied only where a shareholder's current information is replaced with the updated information (ie, on a 'prior to the offering' and 'upon completion of the offering' basis), which can be logistically challenging for both the shareholder and the company as such disclosure requires coordination and communication between the parties.

While shareholders may satisfy their updated disclosure obligations via the disclosure included in the prospectus, the company's reporting obligation is not similarly satisfied, and it must publish this updated shareholder information within two trading days after the capital increase on SIX's electronic reporting and publishing platform.

Sale of rights by shareholders

SIX I/09 is silent on the sale of rights by shareholders, but the Disclosure Office of the SIX Exchange Regulation has subsequently clarified that since the original acquisition of the subscription rights is not subject to the reporting obligation and the subscription rights granted are not added to the reportable shareholding portfolio of the shareholder, it would logically follow that no reporting obligation is triggered upon the sale of such previously granted subscription rights.**(3)**

However, if as a result of the sale of previously granted subscription rights the shareholder falls below a threshold value under Article 120 of the Financial Market Infrastructure Act following the capital increase resulting from its dilution, a new reporting obligation arises. As noted above, this information can be included in the prospectus, if feasible.**(4)**

Purchase of additional rights by shareholders

While no shareholder disclosure duty arises following the granting or sale of subscription rights, the analysis differs when a shareholder acquires subscription rights in excess of its proportionate holding in the company, such as through the purchase of rights.

Such an acquisition of derivative equity rights (ie, a purchase position) would trigger a disclosure obligation if, as a result, the threshold values under Article 120 of the Financial Market Infrastructure Act are reached or exceeded.

Importantly, according to Article 14(2) of the FINMA Financial Market Infrastructure Ordinance, the basis for calculating the threshold value in such circumstances is the total number of voting rights entered in the commercial register at the corresponding point in time (ie, prior to the completion of the offering), not what the expected total number of voting rights will be upon completion of the rights offering and capital increase.

Therefore, certain shareholders that acquire additional rights may cross one of the threshold values under Article 120 of the Financial Market Infrastructure Act during the subscription period of the rights offering, triggering a notification obligation, only to fall below a relevant threshold once the capital increase in connection therewith has been entered in the commercial register.

After entry, a further reporting obligation may arise if a threshold value under Article 120 of the Financial Market Infrastructure Act is reached or passed as a result of the updated total number of voting rights recorded in the commercial register.

Shareholder commitments

In many rights offerings where there are significant shareholders, companies commonly seek the advanced commitment of such shareholders to participate in the offering through, for example, the signing of a commitment letter ahead of the launch of the rights offering. It is generally believed that such commitments provide a positive message to the market, namely, that the significant shareholders continue to support the company, and also mitigate certain execution risks.

However, in connection with such commitments, a potential shareholder disclosure issue arises. Specifically, if as a result of the commitment, which could be qualified as a purchase position and be calculated on a pre-capital increase basis (see Article 14(2) of the FINMA Financial Market Infrastructure Ordinance), the shareholder reaches or exceeds a threshold value under Article 120 of the Financial Market Infrastructure Act, a notification duty could arguably be triggered.

However, since the shareholder is entitled to such subscription rights as a legally foreseen consequence of the contemplated capital increase, and, the shareholder is doing nothing more than notifying the company of its agreement to retain its proportionate stake in the company following the capital increase, it logically follows that the same analysis should apply as with the initial granting of subscription rights, and thereby not trigger any additional notification duties.

New investors and additional shareholder commitments

In addition to securing existing shareholder commitments ahead of launching a rights offering, companies also regularly explore opportunities to secure the commitment of new investors or extend the commitment of existing shareholders through the purchase of those shares in respect of which subscription rights have not been validly exercised (ie, the rump shares).

Here, a clear distinction can be made to the commitment by a shareholder to exercise its subscription rights. In this context, there is an undertaking from a new investor and/or an existing shareholder to purchase shares and thereby establish or increase its stake in the company, clearly representing a purchase position. Such purchase positions, along with any current holdings, will need to be assessed and calculated on a pre-capital increase basis (see Article 14(2) of the FINMA Financial Market Infrastructure Ordinance) to determine whether a threshold value under Article 120 of the Financial Market Infrastructure Act is reached or passed.

In the context of a rights offering, the number of rump shares is unknown until the expiration of the subscription period. Therefore, the purchase position calculations will need to be based on a number of assumptions, including taking into account any shareholder commitments to participate in the rights offering and any agreed upon investment parameters.

Other facts and circumstances must also be considered when evaluating the commitments of new investors and/or existing shareholders in determining whether an actual reporting obligation has arisen, such as:

- the timing of the commitment (ie, a commitment letter signed prior to the rights offering or a commitment letter signed the day the rights offering expires); and
- the form of such commitment (ie, a one-sided letter or a countersigned agreement).

Such facts and circumstances must be carefully considered and evaluated on a case-by-case basis. Similarly, the company will also need to evaluate whether such commitments in relation to the rump shares, which could potentially represent sale positions, would trigger a separate obligation on the part of the company pursuant to Article 120 of the Financial Market Infrastructure Act.

Lock-up arrangements

In rights offerings (like other equity offerings), it is also customary for the underwriting consortium (ie, the managers) to seek lock-up undertakings from any significant shareholders or new investors not to, among other customary prohibitions, sell any shares for a specified period of time.

To the extent that more than one party is entering into a lock-up arrangement in favour of the banking syndicate, such parties would be considered a group acting in concert pursuant to Article 121 of the Financial Market Infrastructure Act and Article 12 of the FINMA Financial Market Infrastructure Ordinance and subject to notification duties.

The disclosure of all shareholders included in a lock-up group can often create certain complications because such lock-up groups usually comprise numerous parties, especially when shares held by a company's significant shareholders, board of directors and management form part of the lock-up group. To assist with the disclosure of such lock-up groups, SIX I/09 provides eased conditions relating to the obligation to notify through publication in the prospectus.

SIX I/09 outlines the specific facts that must be disclosed in the prospectus, including (among others):

- the precise duration of the lock-up arrangement (ie, the expiration date);
- the counterparty (eg, issuer or underwriting consortium);
- the number of group members;
- the type and total number of equity securities held;
- the total proportion of the corresponding voting rights; and
- the group representative.

For individual shareholders who directly or indirectly own less than 3% of the company's voting rights, the disclosure of further details is waived; however, for those shareholders who directly or indirectly represent 3% or more of the voting rights the prospectus disclosure must include certain additional information, including the name, registered office or place of residence as well as the number of shares held directly or indirectly and the corresponding proportion of voting rights.

While disclosure obligations of the lock-up group can be satisfied via the disclosure included in the prospectus, the company's reporting obligation is not similarly satisfied, and it must publish information regarding the shareholder group within two trading days on SIX's electronic reporting and publishing platform.

For further information on this topic please contact Thomas M Broennimann or Christina Del Vecchio at Niederer Kraft Frey by telephone (+41 58 800 8000) or email (thomas.m.broennimann@nkf.ch or christina.delvecchio@nkf.ch). The Niederer Kraft Frey website can be accessed at www.nkf.ch/en.

Endnotes

(1) In Switzerland, there are two stock exchanges: SIX Swiss Exchange Ltd and BX Berne eXchange. Since the SIX is the main exchange in Switzerland, this update assumes (for ease of reference) that any notifications will need to be made to the SIX. However, for shares listed on BX, relevant notifications would need to be made to the BX.

(2) See SIX Exchange Regulation Official Disclosure Notice of 7 April 2009 (SIX I/09).

(3) See *Offenlegungsstelle der SIX Swiss Exchange, Jahresbericht 2012*.

(4) See "Shareholder Disclosure Obligations in Rights Offerings—Capital Increases".