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Short & Simple

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The Financial Market Infrastructure and Market Conduct in Securities and Derivatives Trading Act (FMIA; Financial Market Infrastructure Act) – Changes in disclosure of shareholdings, public takeover offers, insider trading, market manipulation and administrative assistance

The FMIA and its associated Financial Market Infrastructure Ordinance (FMIO) and FINMA Financial Market Infrastructure Ordinance (FMIO-FINMA) came into force on 1 January 2016. Through this, the following areas of Swiss capital markets law have been pooled in one act: (i) the licensing and organisation of financial market infrastructures, (ii) trading of derivatives, (iii) the disclosure of shareholdings and public takeover offers, (iv) insider trading and market manipulation and (v) administrative assistance. In three issue of «Short & Simple», we will give you an overview of the relevant changes in these areas. This issue of «Short & Simple» addresses the changes in the areas of disclosure of shareholdings, public offers and market manipulation as well as administrative assistance.

You can find the other two issues of «Short & Simple» at the following links: Approval and organisation of financial market infrastructures: Link; trading of derivatives: Link.

I. Changes in the area of disclosure of shareholdings

The provisions on the disclosure of shareholdings have largely been taken over unchanged from the Stock Exchange and Securities Trading Act (SESTA) to the FMIA. Reporting obligations continue to apply upon reaching, falling below or exceeding shareholding thresholds of 3, 5, 10, 15, 20, 25, 33⅓, 50 or 66⅔% of the voting rights of a Swiss company whose shares are listed in Swit-zerland or of a foreign company whose shares are listed primarily in Switzerland.

The case law of the Swiss Federal Supreme Court has led to an important change now reflected in the FMIA. Art. 120 para. 3 FMIA now states that any person who can exercise the voting rights of shares pursuant to art. 120 para. 1 FMIA at his discretion is also subject to disclosure obligations. Behind this change are cases in which a person other than the beneficial owner, for example an asset manager, can legally or de facto decide about the exercise of voting rights. In such cases where beneficial ownership and voting rights diverge, the rationale of legislation on disclosure obligations justifies also imposing disclosure obligations on any third party that can exercise voting rights freely. Although art. 9 para. 2 of the Stock Exchange and Securities Trading Ordinance (SESTO) already contained such an obligation, the Supreme Court determined that it was invalid because it exceeded the framework of legal delegation granted by art. 20 para. 5 SESTA. The provision in art. 120 para. 3 FMIA has now corrected this.

Banks that process stock market transactions or hold safekeeping accounts, or classic asset managers who choose investment types but are not authorised to exercise voting rights independently, continue to not have any reporting obligations.

Circumstances equated with acquisition or disposal of shareholdings are now newly listed in art. 120 para. 4 FMIA. Thus, the first-time listing of shares has the same consequences in terms of disclosure obligations as acquisition.

II. Changes in the area of public takeover offers

The provisions on public takeover offers were taken over mostly unchanged from the SESTA into the FMIA. Art. 22-33d SESTA correspond to the new art. 125-141 FMIA.

One new aspect is that regulations on fees must in principle be issued by the Federal Council (art. 126 para. 5 FMIA). The Federal Council has done so by laying down the fee regulations in art. 117-119 FMIO.

III. New regulations on insider trading and market manipulation

The provisions on insider trading and market manipulation/price manipulation were taken over mostly unchanged from the SESTA to the FMIA. Supervisory and criminal proceedings thus continue to exist parallel to each other in the FMIA.

Art. 142 and 143 FMIA make clear that the regulations concern securities traded on a trading platform in Switzerland. Besides stock markets, multilateral trading platforms are also affected.

Furthermore, art. 142 para. 1 lit. c FMIA makes clear, in the interest of legal certainty, that it is forbidden to exploit a recommendation that one knows or must know is based on insider information.

The provisions of the SESTO on exceptions from the prohibition of insider trading and market manipulation were taken over mostly unchanged from the SESTO to art. 122 to 128 FMIA. However, the rule that the exception from the prohibition on insider trading and market manipulation does not apply when prices are offered during trading stops or during the opening or closing auction has proven too inflexible and impractical in practice. Thus, art. 55e lit. d SESTO was not taken over into the FMIA. The issuer must have the chance to ensure stability during these phases if the securities are put under pressure. Because the stabilisation action must be announced by the issuer and is limited in time and extent, this ensures that no manipulative interference can occur.

IV. Administrative assistance

The provisions on administrative assistance previously contained in art. 38 aSESTO and art. 42 and 43 of the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA) have been fundamentally revised.

Art. 42 FINMASA regulates the principles of international cooperation and the conditions for transmission of information to foreign financial market authorities. The information may only be used to aid the execution of the legislation on financial markets and the requesting authority must be bound to rules of official or professional secrecy (art. 42 para. 2 FINMASA). The FINMA must further respect the principle of proportionality (art. 42 para. 3 FINMASA).

Administrative assistance proceedings are regulated uniformly in art. 42a FINMASA. According to the Report of the Federal Council on the law, the previous proceedings pursuant to the aFINMASA harboured a danger of delays. Moreover, due to the case law of the courts, the FINMA was forced to disclose the original request of the foreign supervisory authority to the suspect customers because of their right to inspect the records, which, according to the Report, led to delays and destruction of evidence. Because of this, the procedure has been restricted. The FINMA can now refuse to grant requests to inspect correspondence with foreign authorities, and in particular correspondence relating to administrative assistance proceedings, on the basis of art. 42a para. 3 FINMASA. However, even in this case, the affected customers must be informed as to the essential content of the request for administrative assistance and be offered the opportunity to comment on it (art. 28 Administrative Procedure Act, APA). Still, the FINMA can exceptionally refrain from informing customers at all prior to transmitting information if the purpose of the administrative assistance and the effective fulfilment of the tasks of the requesting authority would be defeated by providing such information (art. 42a para. 4 art. 42a para. 3 FINMASA). The affected customers must be informed afterwards and can request that the Federal Administrative Court review the legality of the actions.

The new restricted proceedings and the restriction of the right to inspect the file may well meet international requirements, but they are not unproblematic in view of the guarantee of judicial review laid down in art. 29a of the Swiss Constitution. It is clear that ex post review of administrative assistance proceedings that have already been completed does not benefit the affected customer at all. The refusal to grant access to the request for administrative assistance also makes it impossible for the customer to point out any gaps or contradictions in the request.

Art. 42c FINMASA provides for direct transmission of information outside of the ordinary administrative assistance procedure by supervised parties when the conditions of art. 42 para. 2 FINMASA are fulfilled and the rights of the customers and third parties are respected (para. 42c para. 1 FINMASA). Information can be transmitted by the supervised parties without obtaining approval pursuant to art. 271 of the Swiss Criminal Code. The transmission must be reported to the FINMA in advance if information of considerable importance is concerned (art. 42c para. 3 FINMASA), although it is not clear in which cases such considerable importance is given. Art. 42c para. 3 FINMASA contains a reference to art. 29 para. 2 FINMASA. Art. 29 para. 2 FINMASA is a blanket clause that allows information to be provided to the supervisory authority on a case-by-case basis if this is not already foreseen in a special provision. Point 7.1 of Circular Letter 2008/1 (Approval and Reporting Requirements for Banks) mentions criminal acts, serious abuses, loss of half of one's own funds, endangerment of creditors or cases where creditors' claims are no longer covered by the assets as possible situations where this would apply. It remains to be seen whether the FINMA will concretise what is to be deemed «considerable» in the sense of art. 42c FINMASA in a Circular Letter. The wording of art. 42c FINMASA clearly indicates that there is no obligation («necessity») for the supervised parties to inform the FINMA in advance when the transmission of information is not of considerable importance. Still, supervised parties always have the possibility to inform the FINMA voluntarily. However, they are not legally entitled to receive a written declaration, as is the case in art. 4quinquies para. 2 BankA, for example. If the FINMA – however it has learned of an upcoming transmission of information – reserves the right to seek administrative as-sistance, it may decide not to transmit the information in the end.

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