SIX EXCHANGE REGULATION

Jahresbericht 2021
Offenlegungsstelle
SIX Exchange Regulation AG

SIX
EXCHANGE
REGULATION

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1. Einleitung

Mit dem vorliegenden Jahresbericht orientiert die Offenlegungsstelle der SIX Exchange Regulation AG die Öffentlichkeit über ihre Praxis und vermittelt einen Überblick über ihre Tätigkeiten im Berichtsjahr 2021.

Die Offenlegungsstelle hat im Berichtsjahr 2021 insbesondere durch den Erlass neuer Empfehlungen die Praxis weiterentwickelt (vgl. Ziff. 3.2.).

Mit Verfügung vom 9. September 2021 hat die Eidgenössische Finanzmarktaufsicht FINMA (FINMA) der SDX Trading AG eine Bewilligung als Börse erteilt. Die SDX Trading AG hat die Aufgaben einer Offenlegungsstelle gemäss Art. 27 Abs. 2 FinfraV-FINMA an die SIX Swiss Exchange AG übertragen. Die damit zusammenhängenden Aufgaben werden demgemäss durch die Offenlegungsstelle der SIX Exchange Regulation AG übernommen. Das angepasste Reglement der Offenlegungsstelle, aus dem zeitgleich auch die Bestimmungen bezüglich der Fachkommission für Offenlegung gestrichen wurden, finden seit Inkraftsetzung am 15. Oktober 2021 somit auch für die SDX Trading AG Anwendung.

2. Die Offenlegungsstelle SIX Exchange Regulation AG

2.1. Rechtliche Grundlagen

Die Grundlage für die Schaffung der Offenlegungsstelle findet sich in Art. 123 FinfraG i.V.m. Art. 27 FinfraV-FINMA.

Kompetenzen, Organisation und Verfahren der Offenlegungsstelle sind im Reglement der Offenlegungsstelle von SIX Swiss Exchange vom 26. Mai 2021 (Reglement OLS) festgehalten.

2.2. Rechtsquellen

Für ihre Tätigkeit stützt sich die Offenlegungsstelle auf folgende Rechtsquellen:

- Finanzmarktinfrastrukturgesetz (FinfraG, SR 958.1);
- Finanzmarktinfrastrukturverordnung (FinfraV, SR 958.11);
- Finanzmarktinfrastrukturverordnung-FINMA (FinfraV-FINMA, SR 958.111);
- Reglement OLS;
- Mitteilungen der Offenlegungsstelle (Thema: Offenlegung von Beteiligungen).

2.3. Organisation

Die Offenlegungsstelle ist administrativ der SIX Exchange Regulation AG, Geschäftsbereich Listing & Enforcement, angegliedert (Art. 1 Reglement OLS).

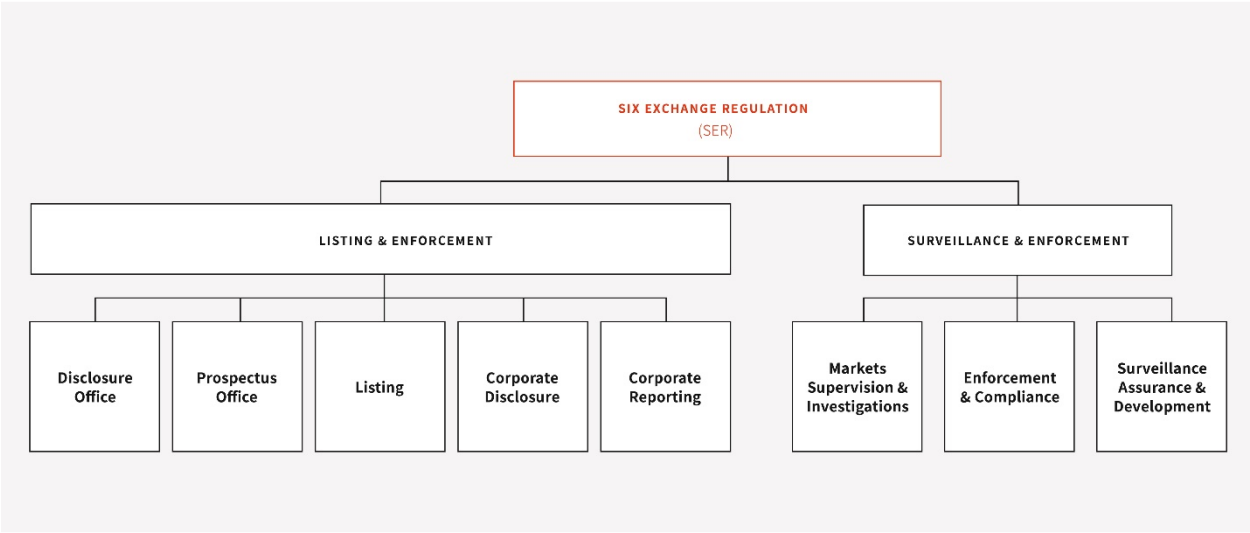

Abbildung 1: Organigramm SIX Exchange Regulation AG (Quelle: https://www.ser-ag.com/de/about.html)

3. Praxis der Offenlegungsstelle

3.1. Rechtliche Grundlagen

Gemäss Art. 27 Abs. 1 FinfraV-FINMA ist die Offenlegungsstelle einerseits zuständig für die Überwachung der Melde- und Veröffentlichungspflicht, andererseits aber auch für die Bearbeitung von Gesuchen um Ausnahmen und Erleichterungen von dieser Melde- und Veröffentlichungspflicht sowie um Vorabentscheide. Diesbezüglich erlässt die Offenlegungsstelle gegenüber den Gesuchstellern Empfehlungen, welche zu begründen und auch der FINMA mitzuteilen sind (Art. 28 Abs. 2 FinfraV-FINMA).

Ausnahmen oder Erleichterungen von der Melde- und Veröffentlichungspflicht können gemäss Art. 123 Abs. 2 FinfraG i.V.m. Art. 26 Abs. 1 FinfraV-FINMA aus wichtigen Gründen gewährt werden, insbesondere wenn die Geschäfte: a. von kurzfristiger Natur sind; b. mit keiner Absicht verbunden sind, das Stimmrecht auszuüben; oder c. an Bedingungen geknüpft sind.

Nach Art. 123 Abs. 3 FinfraG i.V.m. Art. 21 Abs. 1 FinfraV-FINMA besteht zudem die Möglichkeit, über Bestand oder Nichtbestand einer Offenlegungspflicht einen Vorabentscheid einzuholen. Die Gesuche um Ausnahmen oder Erleichterungen resp. Vorabentscheid sind jeweils rechtzeitig vor Abschluss des beabsichtigten Geschäfts an die Offenlegungsstelle zu richten. Auf Gesuche für bereits abgeschlossene Geschäfte kann die Offenlegungsstelle nur ausnahmsweise eintreten (Art. 21 Abs. 2 FinfraV-FINMA). In diesem Zusammenhang ist zu berücksichtigen, dass der Offenlegungsstelle zum Erlass einer Empfehlung zehn Börsentage (vgl. Handelskalender von SIX Swiss Exchange) zur Verfügung stehen und die FINMA innert weiteren fünf Börsentagen erklären kann, dass sie in der Sache selber entscheidet (siehe Art. 28 Abs. 5 FinfraV-FINMA, Art. 5 Abs. 1

Reglement OLS). Auf entsprechenden Antrag und unter zusätzlicher Kostenfolge kann die Offenlegungsstelle Gesuche innert kürzeren Fristen bearbeiten (Art. 5 Abs. 3 Reglement OLS).

Lehnt der Gesuchsteller die Empfehlung der Offenlegungsstelle ab, so kann er dies innert fünf Börsentagen mit einer begründeten schriftlichen Eingabe an die FINMA mitteilen. In diesem Fall erlässt die FINMA eine Verfügung (zum Verfahren: vgl. Art. 28 FinfraV-FINMA).

Gemäss Art. 27 Abs. 3 FinfraV-FINMA informieren die Offenlegungsstellen laufend über ihre Praxis. Sie können Mitteilungen und Reglemente erlassen und Informationen, die zur Erfüllung des Gesetzeszwecks notwendig sind, in geeigneter Weise publizieren. Die Veröffentlichung von Empfehlungen hat grundsätzlich in anonymisierter Form zu erfolgen.

Die nachfolgend zusammengefassten Empfehlungen (vgl. Ziff. 3.2) wurden weder vom Gesuchsteller abgelehnt noch von der FINMA zur Entscheidung an sich gezogen bzw. attrahiert.

3.2. Auszug aus den Empfehlungen

3.2.1. Kapitalmarkttransaktionen: Empfehlung OLS-01/21-A: Erleichterungen und Ausnahmen im Zusammenhang mit Rechtsgeschäften hinsichtlich einer Kapitalerhöhung

Stichworte: Kapitalerhöhung; eigene Beteiligungen; Haltedauer

Zusammenfassung: Zur Finanzierung einer Transaktion plante die Gesuchstellerin, neue Aktien aus genehmigtem Kapital zu schaffen. Zur Zahlung eines Teils des Kaufpreises beabsichtigte die Gesuchstellerin, die neuen Aktien wenige Tage nach der Kapitalerhöhung ihrem Joint Venture Partner zu übertragen. Die Gesuchstellerin ersuchte die Offenlegungsstelle um Entbindung der Meldepflicht betreffend die eigenen Aktien, welche vor der Übertragung an ihren Joint Venture Partner nur wenige Tage gehalten werden sollten.

Die Offenlegungsstelle gewährte die Ausnahme unter Berücksichtigung der Gesamtumstände.

a. Facts and Grounds of the Application

The Applicant points out that on [Date], [Issuer] announced that it has signed an agreement to take full ownership of its joint venture [B] by acquiring the [...]% shareholding of its joint venture partner [C] for [D] in the two joint venture companies [E] and [F] ("Transaction"). The completion of the Transaction is subject to several customary closing conditions, including [Country A] and certain other antitrust approvals.

According to the Applicant, the Transaction will be funded through a combination of shares, available cash balances and credit facilities. [C] will receive [Number] [Issuer] shares (i.e. the New Shares), equivalent to a stake of approx. [Number]% of [Issuer]'s share capital on a pro-forma fully diluted basis, and a cash consideration of € [Amount] for its [...]% stake in [B].

The Applicant states that the issuance of the New Shares will be done out of the authorized share capital provided for in [...] the articles of association of [Issuer]. The pre-emptive rights of the existing [Issuer] shareholders will be excluded and allocated to third parties (i.e. [A] as initial subscriber of the New Shares and ultimately [C]), a possibility foreseen in this provision. The New Shares will be subscribed by [A], a fully owned subsidiary of [Issuer], at a nominal value of CHF [Amount] per share and sold to [Issuer] on the same day. Thereafter, [Issuer] will transfer the

New Shares in the context of the closing of the Transaction to [C] as part of the purchase price for the full acquisition of its joint venture companies.

The Applicant points out that [A] will subscribe for the New Shares as part of [Issuer]'s capital increase. Such holding of the New Shares by [A] does not trigger any notification duty even though [A] will reach the [Number]% threshold upon effectiveness of the capital increase out of authorized share capital. [A] will enter into a share transfer agreement with [Issuer] on the same day as the subscription by [A] of the New Shares. Under the terms of the share transfer agreement [A] sells the New Shares to [Issuer] with effect immediately upon creation of the New Shares. As a result, [A]'s acquisition falls under Art. 10 para. 3 lit. c FMIO-FINMA.

The Applicant claims that the reason for the submission of this request does not lie in the subscription of the New Shares by [A] but rather in the contemplated sale of the New Shares from [A] to [Issuer] by which [Issuer] will acquire treasury shares that represent approx. [Number]% of [Issuer]'s share capital and hence would, absent an exemption, trigger a notification duty.

The Applicant seeks an exemption from this duty and points out that the request is based on good cause and refers to types of transactions explicitly mentioned in Art. 123 para. 2 FMIA in conjunction with Art. 26 para. 1 FMIO-FINMA:

The Applicant refers to the term "transaction of a short-term nature" and states that [Issuer] will, upon receipt of the New Shares from [A], hold the New Shares only for a few days between the capital increase and the closing of the Transaction. The capital increase will only be effected if the conditions for the closing of the Transaction are satisfied or very likely to be satisfied within the next few days. The capital increase is not effected on the day of the closing of the Transaction due to the unpredictability of certain (third party) approvals. The contemplated procedure of creating the shares shortly before the closing of the Transaction allows for the required flexibility to deal with said inherent unpredictability. As a result, the holding of the New Shares by [Issuer] is only of a very short-term nature.

The Applicant points out that where the intention to exercise influence is small or absent – or where no influence may be exercised by virtue of law – there is no shift in the potential to control and the interest in being fully informed is low. [Issuer] does not only lack any intention to exercise voting rights attached to the New Shares but the voting rights are also suspended by virtue of statutory law. According to the Applicant, the lack of full transparency has no negative impact on investors as the shareholding does not change the potential to control [Issuer].

According to the Applicant none of the legislative goals and intentions would be undermined if the Applicant was granted an exemption (general clause of good cause).

The Applicant states that the Transaction and the contemplated closing in [Quarter] 2021 have been announced by the Applicant through its ad hoc channels. Therefore, the market is expecting an effective shareholding of [C] in [Issuer] in the next months. A disclosure notification of [Issuer] in own shares reflecting a situation that is a mere technicality and only of a very short-term nature and, additionally, does also not lead to a change in control might be misleading and take the market's focus away from the more relevant transaction, which will be the closing of the Transaction.

[...]

b. Considerations of the Disclosure Office

[...]

Art. 120 para. 1 FMIA stipulates: "Anyone who directly or indirectly or acting in concert with third parties acquires or disposes of shares or acquisition or sale rights relating to shares of a company with its registered office in Switzerland whose equity securities are listed in whole or in part in Switzerland, or of a company with its registered office abroad whose equity securities are mainly listed in whole or in part in Switzerland, and thereby reaches, falls below or exceeds the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50% or 66⅔% of the voting rights, whether exercisable or not, must notify this to the company and to the stock exchanges on which the equity securities are listed."

As a basic principle, the obligation to notify lies with the beneficial owners of equity securities (Art. 120 para. 1 FMIA in conjunction with Art. 10 para. 1 FMIO-FINMA) and / or with the person who has the discretionary power to exercise the voting rights associated with equity securities in accordance with Art. 120 para. 1 FMIA (Art. 120 para. 3 FMIA in conjunction with Art. 10 para. 2 FMIO-FINMA).

The notification duty under Art. 120 para. 1 FMIA arises with the justification of the claim to acquire or sell equity securities (binding transaction), irrespective of whether this claim is conditional (Art. 13 para. 1 FMIO-FINMA).

A notification obligation is triggered when one of the thresholds under Art. 120 para. 1 FMIA is achieved, exceeded or undershot for the acquisition and sale of proprietary equity securities through a company (Art. 16 para. 1 let. b FMIO-FINMA).

For transactions in proprietary securities, the company must provide notification to the relevant disclosure office and publish the notification within four trading days following the emergence of the notification duty (Art. 24 para. 4 FMIO-FINMA).

Pursuant to Art. 26 para. 1 FMIO-FINMA, exemptions or easing provisions to the duty of notification and disclosure may be granted, provided there is good cause for doing so, and particularly if the transactions are (i) short-term in nature, (ii) do not entail any intention to exercise the voting right or (iii) come with conditions.

A consideration of the question whether or not a justified case according to Art. 26 FMIO-FINMA exists must also weigh up the interests of market participants in disclosure notifications that comply with the law and its corresponding ordinances against the interests of the Applicant in obtaining an exemption or easing provision to the duty of notification and disclosure (Gerard Hertig/Christian Meier-Schatz/Robert Roth/Urs P. Roth/Dieter Zobl (eds.), Kommentar zum Bundesgesetz über die Börsen und den Effektenhandel – CHRISTIAN MEIER-SCHATZ, commentary on Article 20 SESTA, N 297, Zurich 2000).

As the Applicant has pointed out correctly, the purchase of the New Shares from [A] triggers a reporting obligation. The Applicant claims that in the case at hand an exemption can be granted, given that (i) this transaction is of a short-term nature, (ii) the Applicant has no intention to exercise the voting rights and (iii) that the general clause of good cause is applicable.

The Applicant states that the voting rights are suspended by virtue of statutory law (cf. Art. 659a para. 1 of the Swiss Code of Obligations). This reasoning cannot be sustained: The legislator has stipulated that participations in own securities are also subject to the notification; this principle is mirrored in Art. 16 para. 1 let. b FMIO-FINMA. Since it must be assumed that the legislator has taken statutory law into account in its consideration (cf. wording of Art. 120 para. 1 FMIA: "(...) and thereby reaches, falls below or exceeds the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50% or 66⅔% of the voting rights, whether exercisable or not (...)"), a mere reference to the Swiss Code

of Obligations cannot suffice. Rather, the circumstances of the individual case must be taken into account.

The provisions on the disclosure of shareholdings aim to ensure and increase transparency regarding the party controlling the voting rights as to ensure the protection of financial market participants and the proper functioning of the markets (cf. Art. 1 FMIA). Both the market participants and the companies must have sufficient knowledge regarding the identity of significant shareholders. In principle, the relevant information must be published as quickly as possible and made available to market participants.

As mentioned, the legislator has also made the companies themselves subject to the disclosure of shareholdings. In principle, the market participants have an interest in knowing how many of its own shares a company holds – regardless of whether the voting rights can be exercised.

The decisive factor in the case at hand is that the capital increase will only be effected if the conditions for the closing of the Transaction (with [C]) are satisfied or very likely to be satisfied within the next few days (i.e. if it can be assumed that the Transaction will take place shortly). Since the participation of [Issuer] (resulting from the purchase of the newly issued [Number] shares) in the present case is only "created" and achieved with regard to the Transaction between [Issuer] / [C] and no long-term holding is intended for the same reason, the interest of the Applicant seems to outweigh the interest of market participants.

Moreover, [C] has already reported its shareholding, this information is relevant for the market participants and of great interest, as already announced by means of an ad hoc publication. This disclosure notification provides information on who holds an interest in the company and can – after the date of transfer of equity securities – exercise voting rights. This notification thereby reflects the final result or rather the intended participation following the Transaction between [Issuer] / [C].

In light of this, it seems that the Applicant is right in that a disclosure notification of [Issuer] in own shares as purchase position would be reflecting a situation that is a mere technicality to ensure a smooth closing of the Transaction. It can be assumed with the Applicant that the market might not understand a possible disclosure notification of [Issuer] regarding the purchase of newly issued [Number] shares and that such a publication could lead to a considerable amount of explanation.

Thus, the Applicant can be granted an exemption from the notification duty pursuant to Art. 120 para. 1 FMIA to the effect that the acquisition of the newly issued [Number] registered shares of [Issuer] by [Issuer] from [A] does not need to be reported.

[…]

3.2.2. Kapitalmarkttransaktionen: Empfehlung V-02-21: Erleichterung der Meldepflichten betreffend eigene Beteiligungen

Stichworte: Eigene Beteiligungen; Veräusserungspositionen; Korridor

Zusammenfassung: Vorliegend ging es um eine Gesellschaft, die eigene Beteiligungspapiere im Rahmen von Anreizsystemen für Mitarbeiter hielt. Die Gesellschaft ging davon aus, dass es zu monatlichen oder sogar täglichen Schwankungen um die 5%-Schwelle kommen würde, was jeweils eine Meldepflicht i.S. von Art. 120 Abs. 1 FinfraG ausgelöst hätte. Der Gesuchsteller ersuchte um eine Erleichterung dahingehend, Schwankungen zwischen 4.5% und 5.5% nicht melden zu müssen.

Die Offenlegungsstelle gewährte eine befristete Erleichterung.

a. Facts and Grounds of the Application

The Applicant points out that on [...], [A] submitted a disclosure notification regarding its sales and purchase positions in respect of [A]/[its own] shares in which it notified the crossing of the 5%-threshold for sales positions in Shares as a result of the adjustment of reported terms of the USD [amount] exchangeable loan notes issued by [A] under which the noteholders may convert the loan notes for Shares, subject to [A]'s right to elect cash settlement (the "Notes"). The notified sales position includes a sales position of [number] rights or [number]% of voting rights, respectively, in the context of the Applicant's Incentive Schemes. The other sales position of [number] rights or [number]% of voting rights, respectively, included in the total position relates to the Notes. [...] According to the Applicant, any future fluctuation of the sales position will mainly be due to changes connected to [A]'s Incentive Schemes which is the reason why there may be an oscillation around the 5%-threshold.

According to the Applicant, [A] has several incentive schemes in place, including a so-called Leadership Performance Plan ("LPP"), a so-called Leadership Share Plan ("LSP") and a Global Share Participation Plan ("GSPP"). Under the LPP and the LSP, respectively, [A] grants restricted share units ("RSUs") or performance share units ("PSUs") to certain of its employees. Further, [A] may grant ad hoc RSUs to its employees outside of these plans (for instance new joiners). Under the GSPP, [A] makes a financial contribution to participants in the plan by matching the Shares the participants purchased during the plan cycle with additional Shares (collectively, the "Incentive Schemes").

The Applicant expects to settle the awards under the LPP and the LSP, respectively, as well as ad hoc awards, subject to the respective requirements being fulfilled, in Shares. Awards under the GSPP will be in any case settled in Shares, subject to the respective requirements being fulfilled. As such, these awards are considered sales rights relating to Shares within the meaning of Art. 120 para. 1 FMIA in conjunction with Art. 14 et seq. FMIO-FINMA. Any changes in the respective positions would trigger, the notification duty pursuant to Art. 120 para. 1 FMIA in conjunction with Art. 16 para. 1 lit. b FMIO-FINMA, however, subject to a relevant threshold being reached or crossed and absent an exemption. Other incentive plans of [A] are not relevant in this context since they foresee a compensation in cash and are therefore not linked to any share performance, i.e., no cash settled derivatives. The Applicant points out that the number of sales rights related to Incentive Schemes depends on a number of factors and the sales positions may fluctuate throughout the year.

The Applicant points out that under the Applicant's Incentive Schemes scheduled and extraordinary grants, forfeitures and early or regular vesting occur throughout the year. [A]'s sales position increases with grants under the Incentive Schemes which take place monthly, annually or on an ad hoc basis, depending on the respective incentive plan. On the other hand, the sales position decreases in case of (i) vesting of the respective awards, (ii) termination of employment relationship of a participant or (iii) in certain cases sales of purchased Shares in a GSPP plan cycle that has not ended. The timing of the respective decrease depends on the reason for the change and on the respective Incentive Scheme. Consequently, the actual sales position related to Incentive Scheme depends on a number of factors, including the number of (i) participants in the respective plans (e.g. because they are new joiners or have been promoted internally) (for grants) and (ii) good and bad leavers per month as well as (iii) on the respective regular vesting schedules of the schemes. Accordingly, the number of sales rights for Shares may oscillate around the relevant disclosure

schedules on a monthly, if not on a daily basis, given that the current sales position reported by the Applicant is close to the relevant legal threshold of 5%. Based on the current number of participants, grants, expected vesting and expected fluctuations in [A]'s work force, the Applicant expects the oscillation connected to the Incentive Schemes to take place in a corridor of 4.5-5.5% of the voting rights related to the Shares.

The Applicant states that [A] has submitted a disclosure notification for exceeding the 5%-threshold on [...]. Consequently, the Applicant has complied with the reporting duty triggered by the first crossing of the relevant threshold.

The Applicant points out that where the intention to exercise influence is small or absent – or where no influence may be exercised by virtue of law – there is no shift in the potential to control and the interest in being fully informed is low. [A] does not only lack any intention to exercise voting rights attached to the Shares held by it but the voting rights are also suspended by virtue of statutory law (cf. Art. 659a para. 1 of the Swiss Code of Obligations). According to the Applicant it follows that in a situation like the one at hand the lack of full transparency has no negative impact on investors as the shareholding does not change the potential to control [A]. This would apply even more if the shareholding is only of a very short-term nature as in the present case.

According to the Applicant none of the legislative goals and intentions would be undermined if the Applicant was granted an exemption (general clause of good cause). On the contrary, constant reporting of short-term changes due to an oscillation around a legal threshold would create more confusion than transparency for the market and investors.

The Applicant states that the constant reporting of short-term changes by [A] would not only be burdensome for the Applicant but it would also be disproportionate in view of the minimal increases and decreases of the Applicant's sales position related to Shares and the effect the disclosure may have on transparency for the market.

In conclusion, the Applicant points out that there is good cause for granting the Applicant an exemption to make a disclosure of own shareholdings pursuant to Art. 120 para. 1 FMIA in conjunction with Art. 16 para. 1 lit. b FMIO-FINMA.

[...]

b. Considerations of the Disclosure Office

[...]

Art. 120 para. 1 FMIA stipulates: “Anyone who directly or indirectly or acting in concert with third parties acquires or disposes of shares or acquisition or sale rights relating to shares of a company with its registered office in Switzerland whose equity securities are listed in whole or in part in Switzerland, or of a company with its registered office abroad whose equity securities are mainly listed in whole or in part in Switzerland, and thereby reaches, falls below or exceeds the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50% or 66⅔% of the voting rights, whether exercisable or not, must notify this to the company and to the stock exchanges on which the equity securities are listed.”

The notification duty under Art. 120 para. 1 FMIA arises with the justification of the claim to acquire or sell equity securities (binding transaction), irrespective of whether this claim is conditional (Art. 13 para. 1 FMIO-FINMA).

According to Art. 14 para. 1 FMIO-FINMA whoever reaches, exceeds or falls short of a threshold in one or both of the positions (meaning purchasing and sale positions), must calculate the positions individually and separately of each other and report them both simultaneously.

Art. 15 para. 2 let. b FMIO-FINMA states that the definition of equity derivates includes "the granting (writing) of convertible and acquisition rights, particularly call options, and of sale rights, particularly put options which are designed for or permit actual delivery"; these equity derivates need to be reported.

A notification obligation is triggered when one of the thresholds under Art. 120 para. 1 FMIA is achieved, exceeded or undershot for the acquisition and sale of proprietary equity securities through a company (Art. 16 para. 1 let. b FMIO-FINMA).

For transactions in proprietary securities, the company must provide notification to the relevant disclosure office and publish the notification within four trading days following the emergence of the notification duty (Art. 24 para. 4 FMIO-FINMA).

As the Applicant has pointed out, any changes in the sale positions would trigger, subject to a relevant threshold being reached or crossed and absent an exemption, the notification duty pursuant to Art. 120 para. 1 FMIA in conjunction with Art. 16 para. 1 lit. b FMIO-FINMA.

Pursuant to Art. 26 para. 1 FMIO-FINMA, exemptions or easing provisions to the duty of notification and disclosure may be granted, provided there is good cause for doing so, and particularly if the transactions are (i) short-term in nature, (ii) do not entail any intention to exercise the voting right or (iii) come with conditions.

A consideration of the question whether or not a justified case according to Art. 26 FMIO-FINMA exists must also weigh up the interests of market participants in disclosure notifications that comply with the law and its corresponding ordinances against the interests of the Applicant in obtaining an exemption or easing provision to the duty of notification and disclosure (Gerard Hertig/Christian Meier-Schatz/Robert Roth/Urs P. Roth/Dieter Zobl (eds.), Kommentar zum Bundesgesetz über die Börsen und den Effektenhandel – CHRISTIAN MEIER-SCHATZ, commentary on Article 20 SESTA, N 297, Zurich 2000).

Inter alia, the Applicant states that there is no intention to exercise the voting rights and that the voting rights are suspended by virtue of statutory law (cf. Art. 659a para. 1 of the Swiss Code of Obligations). This reasoning cannot be sustained: The legislator has stipulated that participations in own securities are also subject to the notification; this principle is mirrored in Art. 16 para. 1 let. b FMIO-FINMA. Since it must be assumed that the legislator has taken statutory law into account in its consideration (cf. wording of Art. 120 para. 1 FMIA: *"(...) and thereby reaches, falls below or exceeds the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50% or 66⅔% of the voting rights, whether exercisable or not (...)"*), a mere reference to the Swiss Code of Obligations cannot suffice. Rather, the circumstances of the individual case must be taken into account.

The provisions on the disclosure of shareholdings aim to ensure and increase transparency regarding the party controlling the voting rights as to ensure the protection of financial market participants and the proper functioning of the markets (cf. Art. 1 FMIA). Both the market participants and the companies must have sufficient knowledge regarding the identity of significant shareholders and the amount of their voting rights. In principle, the relevant information must be published as quickly as possible and thereby made available to market participants.

The legislator has also made the companies themselves subject to the disclosure of shareholdings. In principle, the market participants have an interest in knowing how many sale positions in own shares a company holds – regardless of whether the voting rights can be exercised.

In the case at hand, the Applicant requests a corridor with a bandwidth of 4.5% to 5.5% with regard to changes in its sale positions (due to awards under the Applicant's incentive schemes) by referring to the Disclosure Office Notice II/00 dated 20 March 2000. It needs to be pointed out that this notice is no longer in force as its provisions became obsolete. However, the DO is of the opinion that a corridor may in principal serve as a means for easing provisions. As with all measures, it must be examined whether it is appropriate, proportionate and suitable. The question of whether easing provisions can be granted and what the easement might consist of can be addressed together in the present case.

According to the most recent disclosure notification, [A] exceeded the 5%-threshold regarding the sale positions (within the meaning of Art. 14 para. 1 let. b FMIO-FINMA) on [...].

[...]

Therefore, it is comprehensible that the number of sales rights for Shares may oscillate on a monthly, if not on a daily basis. Since the current sale positions (within the meaning of Art. 14 para. 1 let. b FMIO-FINMA) reported by the Applicant are close to the relevant legal threshold of 5%, it seems likely that small increases or decreases in the second sale position will trigger a reporting obligation.

With regard to transparency, disclosure notifications have to contain all the necessary information according to the applicable legal provisions and they have to be clear and comprehensive. The high likelihood of many notifications according to Art. 15 para. 2 let b FMIO-FINMA due to small changes in the sale positions could have a negative effect on transparency. Hence, the DO is of the opinion that in the current case, transparency is not improved if a large number of notifications without substantial content is published. Such notifications would not provide significant added value – especially as it has already been disclosed (initially) that the Applicant holds more than 5% of the sale positions. Furthermore, a large number of notifications would generate a significant amount of administrative and monitoring effort for the Applicant.

The DO deems that a corridor reduces the number of notifications without compromising the interests of the market. The requested bandwidth of 1% is within a reasonable range, as larger oscillations still need to be reported.

Considering all facts and balancing the interests of the market participants and the Applicant, the easing provisions to the Applicant’s duty of notification and disclosure in the abovementioned context can thus be granted.

According to the practice of the DO, the easing provisions to the duty of notification and disclosure are granted for a limited period of time. It has to be noted that the wider a specific corridor, the shorter a possible duration of an exemption or easier disclosure under the obligation to notify may be granted.

[...]

3.2.3. Kapitalmarkttransaktionen: Empfehlung OLS-03/21-A: Erleichterung und Ausnahmen im Zusammenhang mit Joint Bookrunners / Lead Managers

Stichworte: Meldepflicht, Gruppe, Ausnahme und Erleichterung von der Meldepflicht, Intraday-Trading

Zusammenfassung: Vorliegend ging es um vier Gesuchsteller [A], [B], [C] und [D], welche bei der in Frage stehenden Transaktion als vom Emittenten [Issuer] ernannte Joint Bookrunners und Lead Managers fungierten. Die Gesuchsteller ersuchten im Sinne einer Vorsichtsmassnahme um eine Ausnahme von der Meldepflicht für den Fall, dass sich die Transaktion auf zwei Handelstage erstrecken würde – und sie damit nicht von der Intraday-Ausnahme i.S.v. Art. 10 Abs. 3 lit. c FinfraV-FINMA würden Gebrauch machen können.

Die Offenlegungsstelle kam nach Abwägung sämtlicher Umstände zum Entschluss, dass die anbegehrte Ausnahme (befristet) gewährt werden konnte.

a. Facts and Grounds of the Application

[...]

The Applicants point out that [Issuer] intends to launch a private placement of [X] Shares, the [Y] Shares and [Z] Bonds to professional investors in [Country A] as well as outside of [Country A] and the [Country B] to institutional investors and, with respect to the [X] Shares and the [Y] Shares, also in the [Country B] to qualified institutional buyers (the "Transaction"). It is currently planned that the launch of the Transaction will occur not earlier than in the week of [Date].

The Applicants specify that in connection with the placement and sale of a maximum of [Number] [X] Shares, representing up to [Number]% of the [Issuer]'s share capital as registered in the commercial register of [Place], the Applicants are acting as joint bookrunners in accordance with the [Country A] governed [A] agreement (the "[A] Agreement"). The Applicants only commit to purchase the [X] Shares from [Issuer] and immediately sell them to investors in accordance and with the execution of the offer size and pricing supplement to the [A] Agreement (the "[A] Pricing Supplement"). In addition, the Applicants have been mandated by [Issuer] to organize a simultaneous placement of existing shares, i.e., the [Y] Shares, on behalf of certain subscribers of the [Z] Bonds.

Furthermore, the Applicants state that they are acting as joint bookrunners and lead manager, respectively, in connection with the placement and sale of the [Z] Bonds with a denomination of [Currency] [Amount] each, and convertible into up to [Number] Conversion Shares sourced from the conditional capital of [Issuer], representing up to [Number]% of the [Issuer]'s share capital as registered in the commercial register of [Place]. In connection therewith, the Applicants will execute a [Country A] governed [B] agreement (the "[B] Agreement") and will commit only to purchase the [Z] Bonds from the Subsidiary and to sell them to investors in accordance and with the execution of the pricing supplement (the "[B] Pricing Supplement"). Currently, it is not intended to list and admit the [Z] Bonds to trading on [Stock Exchange A].

With regards to timing, the Applicants expect the Transaction to take place as follows:

Date	*Event*
T (Launch Day)	– Between [Time] and [Time]: Execution of [A] Agreement and the [B] Agreement

	– Thereafter: Publication of launch press release
	– Thereafter: Bookbuilding
	– Thereafter:
	  ○ Pricing
	  ○ Execution of the [A] Pricing Supplement and the [B] Pricing Supplement
	  ○ Final allocation of the Instruments to investors
	Note: the pricing, execution and allocation are intended to occur on T, but it may not be excluded that the final allocation (trade date) will occur on T+1

T+1	At the latest prior to opening of the markets: publication of pricing press release regarding the placement of the [X] Shares, the [Y] Shares and the [Z] Bonds
T+2	Capital increase and registration of the [X] Shares in the commercial register of [Place]
T+3	First day of trading of the [X] Shares as well as settlement of the [X] Shares and the [Y] Shares
T+4	Settlement of the [Z] Bonds

The Applicants declare that they have been appointed collectively by [Issuer] and the Subsidiary and act in concert for purposes of effecting the Transaction. As a result, they constitute an organized group in the sense of Art. 121 para. 1 FMIA in connection with Art. 12 para. 1 FMIO-FINMA.

The Applicants will purchase the Instruments and will thereby, collectively, cross a reportable threshold and will cross again a threshold when selling them to investors. As long as the purchase for the Instruments and the allocation and the sale of the Instruments occur on the same day, i.e. the Launch Day (T), the holding of the instruments will not trigger any notification duty because of the intra-day exemption according to Art. 10 para. 3 lit. c FMIO-FINMA.

Since the timeline on the Launch Day is tight, the Applicants cannot fully exclude that the allocation and the sale of the Instruments will occur one trading day later, i.e., on T+1. In such a case, the intra-day exemption would not be applicable, and the Applicants would have to file two disclosure notifications regarding the acquisition and the sale of the Instruments, respectively.

The Applicants seek an exemption from this duty and point out that the request is based on good cause:

The Applicants refer to the term “transaction of a short-term nature” and state that the purchase of the Instruments and the placement of them with investors are made within a few hours and constitute one Transaction. Hence, the Transaction will be of a very short-term.

The Applicants point out that where the intention to exercise influence is small or absent – or where no influence may be exercised by virtue of law – there is no shift in the potential to control and the interest in being fully informed is low. Here, the Applicants do only hold the Instruments for processing of the Transaction. They do not only lack any intention to exercise voting rights

attached to the Instruments, but they are also not in a position to exercise them as they will commit to immediately resale them. According to the Applicants, the lack of full transparency has no negative impact on investors as the holding of the Instruments by the Applicants does not change the potential to control [Issuer].

According to the Applicants none of the legislative goals and intentions would be undermined if the Applicants were granted an exemption as the acquisition and resale of the Instruments by the Applicants are of a mere technical nature (general clause of good cause). As the launch and the pricing of the Transaction will be publicly announced by [Issuer], the Transaction will be disclosed to the market and investors will be aware of the Transaction and the role of the Applicants. The disclosure of a stake and the resale may even be misleading for investors suggesting that the Applicants intend to acquire a stake and sell a stake, respectively.

b. Considerations of the Disclosure Office

[...]

Art. 120 para. 1 FMIA stipulates: "Anyone who directly or indirectly or acting in concert with third parties acquires or disposes of shares or acquisition or sale rights relating to shares of a company with its registered office in Switzerland whose equity securities are listed in whole or in part in Switzerland, or of a company with its registered office abroad whose equity securities are mainly listed in whole or in part in Switzerland, and thereby reaches, falls below or exceeds the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50% or 66⅔% of the voting rights, whether exercisable or not, must notify this to the company and to the stock exchanges on which the equity securities are listed."

Art. 121 FMIA stipulates that a group organised pursuant to an agreement or otherwise must comply with the notification duty laid down in Art. 120 FMIA as a group and shall disclose i) its total holdings; ii) the identity of its members, iii) the nature of the agreement and iv) the representation.

According to Art. 12 para. 1 FMIO-FINMA any party whose conduct regarding the acquisition or sale of shareholdings or exercising of voting rights with third parties by contract or other organised procedure or by law, is acting in concert or as an organised group.

The notification duty under Art. 120 para. 1 FMIA arises with the justification of the claim to acquire or sell equity securities as defined in Art. 14 para. 1 and Art. 15 FMIO-FINMA.

There is no notification duty, if a threshold is temporarily achieved, exceeded or fallen below during a trading day (Art. 10 para. 3 lit. c FMIO-FINMA).

Based on the facts set forth in the Application according to which the Applicants are acting as joint bookrunners and lead manager, the DO assumes for the purpose of this recommendation that the Applicants do in fact qualify as a group within the meaning of Art. 121 FMIA. Furthermore, the DO relies on Applicants' qualification of the Instruments as positions requiring notification in terms of Art. 120 para. 1 FMIA in conjunction with Art. 14 para. 1 FMIO-FINMA.

As the Applicants have pointed out correctly, the purchase and sale of the Instruments by the Applicants triggers a reporting obligation unless both transactions are executed on the same trading day.

Pursuant to Art. 26 para. 1 FMIO-FINMA, exemptions or easing provisions to the duty of notification and disclosure may be granted, provided there is good cause for doing so, and particularly if the

transactions are (i) short-term in nature, (ii) do not entail any intention to exercise the voting right or (iii) come with conditions.

A consideration of the question whether or not a justified case according to Art. 26 FMIO-FINMA exists must also weigh up the interests of market participants in disclosure notifications that comply with the law and its corresponding ordinances against the interests of the Applicants in obtaining an exemption or easing provision to the duty of notification and disclosure (Gerard Hertig/Christian Meier-Schatz/Robert Roth/Urs P. Roth/Dieter Zobl (eds.), Kommentar zum Bundesgesetz über die Börsen und den Effektenhandel – Christian Meier-Schatz, commentary on Article 20 SESTA, N 297, Zurich 2000).

The provisions on the disclosure of shareholdings aim to ensure and increase transparency regarding the party controlling the voting rights in order to ensure the protection of financial market participants and the proper functioning of the markets (cf. Art. 1 FMIA). Both, the market participants and the companies, must have sufficient knowledge regarding the identity of significant shareholders. In principle, the relevant information must be published as quickly as possible and made available to market participants.

In the present case, the Applicants assume that the purchase and sale of the Instruments will take place on the same day (i.e. Launch Day). The possibility that the two transactions might be executed on different days is only taken into account for precautionary reasons - it is not actually planned that the transactions will be executed on different days.

The DO concurs with the Applicants that it is therefore uncertain whether this eventuality will occur at all.

In the event that the eventuality does occur, it should be noted that the Applicants point out that it is planned to have the Instruments purchased and placed for selling within a few hours or days, thus the Transaction is deemed to be of a short-term nature only.

The DO assumes that the acquisition and resale of the Instruments by the Applicants and the group formed for this purpose are of a mere technical nature since they will commit to immediately place and resale the Instruments to determined investors. The DO's understanding therefore is that a long holding period is highly unlikely. Based on their commitment, the Applicants will also not intend to exercise voting rights attached to the Instruments.

The Applicants point out that a disclosure of this Transaction could be misleading to the market participants as this suggests that the Applicants intend to acquire and sell a stake respectively. Moreover, in order to increase the required transparency and fulfil the financial markets information need, the launch and pricing of the Transaction will be publicly announced by the [Issuer], whereas the role of the Applicants will be disclosed to the market and investors.

Against the background that transparency is thus ensured by other means, the DO assumes that disclosure notifications are not necessarily required to meet the interests of the market participants, whereas an exemption provides a great relief for the Applicants as i) it remains uncertain whether the transactions will take place on different days and ii) even if so, the transactions are only short-term in nature and do not seem to entail any intention to exercise the voting rights.

Thus, the Applicants can be granted an exemption from the notification duty pursuant to Art. 120 para. 1 FMIA to the effect that the acquisition and sale of the Instruments as described in the Request a) do not need to be reported.

[…]

The Launch Day is expected to take place no earlier than in the week of [Date]. Therefore, the present exemption is granted until [Date + 1 month].

[…]

3.2.4. Indirekte Beteiligung: Empfehlung OLS-05/21-A: Erleichterungen im Zusammenhang mit Änderung der gemeldeten Angaben und Offenlegung von Direktbeteiligten

Stichworte: Meldepflicht für Konzern; Offenlegung von Direktbeteiligten; Änderungen der gemeldeten Angaben

> **Zusammenfassung**: Vorliegend ging es um die Meldepflichten für Beteiligungen nicht zum Angebot genehmigter ausländischer kollektiven Kapitalanlagen, welche durch den Konzern erfüllt werden. Die Gesuchstellerin ersuchte die Offenlegungsstelle um Erleichterungen dahingehend, von der Pflicht, die Direktbeteiligten (Art. 22 Abs. 3 FinfraV-FINMA) und dazugehörige Änderungen gemäss Art. 16 Abs. 2 FinfraV-FINMA zu melden, entbunden zu werden.
>
> Die Offenlegungsstelle gewährte die beantragte Erleichterung (befristet), basierend auf einer Beurteilung der konkreten Umstände des Einzelfalls.

a. Facts and Grounds of the Application

According to the Applicant, the request is being made on the basis that [Group A] and its affiliate companies have no interest in acquiring any shares to exert significant influence over the management of an issuing body.

The Applicant states that [Applicant] is a leading fund management firm listed in [Country A] and a prominent equity manager in [Country A] which was formerly called [A]. [B] and its affiliates (the [Group B]) have been wholly owned by [Applicant] since [Date]. The [Group B] is an investment management firm with offices in [Place A], [Place B], [Place C] and in [Country B] ([Place D], [Place E] and [Place F]). [C] was acquired on [Date].

[…]

The Applicant states that there is no common investment view across the [Group A] and each of the investment teams within the [Group A] operates with investment independence from each other.

The Applicant declares that the [Group A] has elected to submit notifications of shareholdings on a consolidated basis (aggregated at the level of the ultimate controller, being the Applicant) and will be indicating as such on the disclosure submissions. Previously, the [Group B] and the Applicant's subsidiaries in [Country A] have submitted their shareholding disclosures independently of each other on a disaggregated basis. The Applicant specifies that currently there are no live aggregated disclosures submitted by [Applicant], regarding SIX-listed targets.

The Applicant points out that in an effort to streamline the shareholding disclosure monitoring process, the [Group A] has subscribed to an automated shareholding disclosure monitoring and reporting system. This system aims to reduce the scope for manual intervention and error in the reporting process. However, the system does not have the functionality to monitor for non-threshold information changes e.g., names, addresses and the composition of the group, in particular, the details of direct holders. In fact, none of the systems which the [Group A] considered

as part of this implementation project offered such functionality. Therefore, the [Group A] would like to explore the possibility of avoiding this heavy manual administrative burden on the monitoring and reporting process, potentially increasing the risk of missing non-threshold triggered disclosures. According to the Applicant granting of the easing provision would greatly mitigate the risks associated with monitoring for disclosable non-threshold changes. Consequently, the Applicant assumes that this considerable risk-minimization factor would be a “good cause” for granting an easing provision to the duty of notification and disclosure, as stipulated in Art. 26 FMIO-FINMA.

[...]

b. Considerations of the Disclosure Office

[...]

Art. 120 para. 1 FMIA stipulates: "Anyone who directly or indirectly or acting in concert with third parties acquires or disposes of shares or acquisition or sale rights relating to shares of a company with its registered office in Switzerland whose equity securities are listed in whole or in part in Switzerland, or of a company with its registered office abroad whose equity securities are mainly listed in whole or in part in Switzerland, and thereby reaches, falls below or exceeds the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50% or 66⅔% of the voting rights, whether exercisable or not, must notify this to the company and to the stock exchanges on which the equity securities are listed."

An obligation to notify does not only arise in cases of direct acquisition or sale but also in cases of indirect acquisition or sale (Art. 120 para. 1 FMIA). In the event of an indirect acquisition or indirect sale the notification must contain the full details of both the person making the direct acquisition or sale and of the beneficial owner (Art. 22 para. 3 FMIO-FINMA). If after the disclosure of a significant shareholding a new direct holder is added or if a direct holder is removed, this also triggers a reporting obligation - even if no thresholds are affected (Art. 16 para. 2 in conjunction with Art. 22 para. 3 FMIO-FINMA).

According to Art. 18 para. 1 FMIO-FINMA, the notification obligations according to Art. 120 para. 1 FMIA which apply to holdings in authorized collective investment schemes pursuant to the Federal Act on Collective Investment Schemes (Collective Investment Schemes Act, CISA) must be fulfilled by the licence holder (Art. 13 para. 2 let. a - d CISA in addition to Art. 15 in conjunction with Art. 120 para. 1 CISA).

Art. 18 para. 4 FMIO-FINMA provides that – with respect to funds that are not authorized for public distribution in Switzerland and that are dependent on a group – the obligation to notify contemplated in Art. 120 para. 1 FMIA rests with the group.

The Applicant states to be subject to the rules set forth in Art. 18 para. 4 and Art. 22 para. 3 FMIO-FINMA. As has been elaborated above, the reporting obligations according to Art. 120 para. 1 FMIA, in case of a foreign collective capital investment schemes not approved for offer which depend on a group, are to be met by the group (see Art. 18 para. 4 FMIO-FINMA). [...] As a result, a disclosure notification must be made – inter alia – if the aggregate positions of the [Group A] reach, exceed or fall below one of the disclosure thresholds set forth in Art. 120 para. 1 FMIA. If a disclosure notification is to be made, the Applicant is required to disclose both the beneficial owner and the direct holders of the relevant positions (Art. 22 para. 3 FMIO-FINMA).

Exemptions or easing provisions regarding the duty of notification and disclosure may be granted, provided there is good cause for doing so, particularly if the transactions are short-term in nature, do not entail any intention to exercise the voting right or come with conditions (Art. 123 para. 2 FMIA; Art. 26 para. 1 FMIO-FINMA). The reasons listed in Art. 26 para. 1 FMIO-FINMA are not exhaustive.

A consideration of the question whether or not a justified case according to Art. 26 FMIO-FINMA exists must also weigh up the interests of market participants in disclosure notifications that comply with the law and its corresponding ordinances against the interests of the Applicant in obtaining an exemption or easing provisions to the duty of notification and disclosure (Gérard Hertig/Christian Meier-Schatz/Robert Roth/Urs P. Roth/Dieter Zobl (eds.), Kommentar zum Bundesgesetz über die Börsen und den Effektenhandel – Christian Meier-Schatz, commentary on Article 20 SESTA, N 297, Zurich 2000).

The purpose of the disclosure requirements is to ensure and increase transparency with respect to the effective control relationships of listed companies in order to ensure the protection of investors and the proper functioning of the markets (cf. Art. 1 para. 1 FMIA). Both the market and the issuer must have sufficient knowledge of the identity of the major shareholders. In the case of qualified shareholders or groups of shareholders, whose shareholding is linked for an indefinite period of time to the possibility of exercising voting rights, there is, in other words, a considerable interest in the publication of disclosure notifications.

The Applicant request that [Applicant] should be exempt from the duty to specify the direct holders of the positions it discloses (in deviation from the requirement of Art. 22 para. 3 FMIO-FINMA).

As to the reasons why the Applicant must be allowed to omit information regarding direct holders, the Applicant points out, that the [Group A] subscribed to an automated shareholding disclosure monitoring and reporting. This system shall aim to reduce the scope for manual intervention and error in the reporting process. However, the system does not have the functionality to monitor for non-threshold information changes e.g., names, addresses and the composition of the group, in particular, the details of direct holders. According to the Applicant, this monitoring and reporting process includes a heavy manual administrative burden, potentially increasing the risk of missing non-threshold triggered disclosures.

From the point of view of transparency, disclosure notifications have to contain all the necessary information according to the applicable legal provisions and they have to be clear and comprehensive. In the case at hand, the Disclosure Office assumes that the number of direct shareholders cannot be estimated, but as a result of the group structure it cannot be excluded that the number could be significant. Both a large number of direct shareholders and the high likelihood of many notifications according to Art. 16 para. 2 FMIO-FINMA due to changes in the information could have a negative effect on transparency. Hence, it has to be mentioned that transparency is not improved if a large number of notifications without substantial content is published – especially if no thresholds are triggered. Such notifications would not provide significant added value. Furthermore, a large number of notifications would not only generate a lot of administrative effort for the Applicant but also for the issuers of the respective shares. Finally, disclosure notifications containing a large number of direct shareholders would be quite extensive and could have a negative effect on the clarity of the disclosure notifications.

Considering all facts and balancing the interests of the market participants and the Applicant, the easing provision as requested by the Applicant seems justified in the current case. Hence, the Disclosure Office approves the Applicant's request: When disclosing positions held by collective

investment schemes that are dependent on the [Group A] but are not approved for sale within the meaning of Art. 18 para. 4 FMIO-FINMA, only [Applicant] has to be disclosed but no direct shareholders. As a consequence of this, no obligation to disclose arises due to changes regarding direct holders pursuant to Art. 16 para. 2 FMIO-FINMA.

[...]

3.2.5. Kapitalmarkttransaktionen: Empfehlung V-06-21: Vorabentscheid im Zusammenhang mit der Unabhängigkeit einer ausländischen kollektiven Kapitalanlage

Stichworte: Unabhängigkeit einer ausländischen kollektiven Kapitalanlage, Meldepflicht als Gruppe, konsolidierte Meldepflicht, personelle Unabhängigkeit, organisatorische Unabhängigkeit

Zusammenfassung: Vorliegend ging es um eine Muttergesellschaft, welche die Akquisition einer Mehrheitsbeteiligung an einer ausländischen kollektiven Kapitalanlage über ihre Tochtergesellschaft plante. Die beiden akquirierenden Gesellschaften (d.h. Mutter- und Tochtergesellschaft) ersuchten die Offenlegungsstelle um die Feststellung, dass nach der genannten Akquisition die Unabhängigkeit i.S. von Art. 18 Abs. 3 und 5 FinfraV-FINMA zwischen der zu akquirierenden ausländischen kollektiven Kapitalanlage und den Gesuchstellerinnen bestehen bleibe und folglich die Meldepflichten durch die Fondsleitung der ausländischen kollektiven Kapitalanlage erfüllt werden könnten.

Die Offenlegungsstelle kam nach Abwägung sämtlicher Umstände zum Entschluss, dass vorliegend sowohl die personelle als auch die organisatorische Unabhängigkeit i.S. von Art. 18 Abs. 5 FinfraV-FINMA der ausländischen kollektiven Kapitalanlage von den Gesuchstellerinnen bejaht werden konnten.

a. Exposé des faits et motivation de la requête

Les Requérantes font valoir que [A] est une société anonyme de droit [du pays A] dont le siège se trouve à [endroit A], et dont les actions sont cotées sur le marché [du pays A]. Sa filiale [B] est une société à responsabilité limitée de droit [du pays B] dont le siège se trouve à [endroit B]. [B] est une filiale indirecte à 100% de [A]. [B] gère et détient des investissements alternatifs d'un montant total d'environ EUR [montant]. [B] investit principalement dans des actifs immobiliers et des fonds de private equity, des fonds actifs dans la santé et la technologie et des hedge funds.

Pour les besoins de la requête, [A] agit en qualité de représentant, au sens de l'art. 121 LIMF, du groupe formé par les familles [C] et [D], qui est actuellement composé de [E], [F], [G], et [H] (le [Groupe A]). Selon les Requérantes, à ce jour, la seule société dans laquelle le [groupe A] a annoncé une participation supérieure à 3% des droits de vote pour les besoins de l'art. 120 LIMF est [émetteur].

Le [Groupe A] détient [nombre]% du capital et [nombre]% des droits de vote de [A], par l'intermédiaire de la société [I], [endroit I] (détenteur direct) et d'autres entités.

[Date], [B] et [J] ont annoncé par voie de communiqué de presse que des négociations exclusives étaient engagées entre les deux sociétés et que [B] envisageait d'acquérir une participation de [nombre]% dans [J] (la Transaction Envisagée). La date actuellement prévue pour la conclusion de la Transaction Envisagée (*signing*) par les parties est [date].

[J] est une société de gestion de droit [du pays J] agréée par les Autorités des marchés financiers [du pays J]. [Date], [J] gérait des actifs représentant au total environ EUR [nombre], notamment par

le biais de [nombre] fonds. Ces fonds sont "dépendants" de [J] au sens de l'art. 18 al. 4 OIMF-FINMA. Aucun de ces fonds n'est autorisé à la distribution en Suisse au sens de l'art. 18 al. 1 OIMF-FINMA.

En sa qualité de société de gestion agréée par les Autorités des marchés finaciers [du pays J], [J] est soumise à la règlementation [du pays J] en la matière. Pour mettre en œuvre ces réglementations, [J] a adopté différents règlements internes.

Ces différentes normes et règlements internes ont vocation à continuer de s'appliquer après l'exécution de la Transaction Envisagée. Il est en outre prévu que le directoire de [J] continue d'exercer les droits de vote des positions gérées par [J] indépendamment des Requérantes, et que [J] et les fonds demeurent par conséquent indépendants de [A] et de ses actionnaires de contrôle au sens de l'art. 18 al. 3 et 5 OIMF-FINMA.

A la teneur de l'art. 8 al. 5 OIMF-FINMA, l'indépendance d'une direction de fonds suppose notamment son indépendance personnelle et organisationnelle. Dans le cas d'espèce, les Requérantes assurent que [J] satisfera à ces conditions après l'exécution de la Transaction Envisagée. [...].

[...].

b. Considérants de l'Instance pour la publicité des participations

[...]

Art. 120 al. 1 LIMF dispose que : " *Quiconque, directement, indirectement ou de concert avec des tiers, acquiert ou aliène des actions ou des droits concernant l'acquisition ou l'aliénation d'actions d'une société ayant son siège en Suisse et dont au moins une partie des titres de participation sont cotés en Suisse ou d'une société ayant son siège à l'étranger dont au moins une partie des titres de participation sont cotés en Suisse à titre principal, et dont la participation, à la suite de cette opération, atteint ou franchit, vers le haut ou vers le bas, les seuils de 3, 5, 10, 15, 20, 25, 33⅓, 50 ou 66⅔ % des droits de vote, pouvant être exercés ou non, doit le déclarer à la société et aux bourses auprès desquelles les titres de participation sont cotés.* "

Le titulaire d'une autorisation (art. 5, al. 1, en relation avec l'art. 2, al. 1, let. d, LEFin, art. 13, al. 2, let. a à d, de la loi du 23 juin 2006 sur les placements collectifs (LPCC) et art. 15, al. 1, let. e, en relation avec l'art. 120, al. 1, LPCC) est tenu de déclarer au sens de l'art. 120, al. 1, LIMF les participations des placements collectifs autorisés en vertu de la LPCC (art. 18 al. 1 OIMF-FINMA).

Dans le cas des placements collectifs étrangers qui ne dépendent pas d'un groupe et dont l'offre n'est pas autorisée, les obligations de déclarer selon l'art. 120, al. 1, LIMF doivent être satisfaites par la direction du fonds ou la société. L'al. 2 s'applique à l'obligation de déclarer (art. 18 al. 3 OIMF-FINMA).

L'art. 18 al. 5 OIMF-FINMA dispose que l'indépendance de la direction du fonds ou de la société suppose notamment:

a. *l'indépendance personnelle:* les personnes de la direction du fonds ou de la société qui contrôlent l'exercice des droits de vote agissent indépendamment de la société-mère du groupe et d'autres sociétés qu'elle domine;

b. *l'indépendance organisationnelle:* par ses structures organisationnelles, le groupe garantit:

1. que la société-mère du groupe et les autres sociétés qu'elle domine n'interviennent pas sous la forme de directives ou de toute autre manière dans l'exercice des droits de vote par la direction du fonds ou la société, et
2. qu'aucune information pouvant avoir une incidence sur l'exercice des droits de vote n'est échangée ou ne circule entre la direction du fonds ou la société et la société-mère du groupe ou d'autres sociétés qu'elle domine.

Selon l'art. 18 al. 6 OIMF-FINMA, dans les cas prévus à l'al. 3, le groupe doit remettre les documents suivants à l'instance pour la publicité des participations compétente:

a. une liste nominative de toutes les directions de fonds ou des sociétés;

b. une déclaration attestant que les conditions d'indépendance selon les al. 3 et 5 sont remplies et respectées.

Le groupe doit annoncer à l'instance pour la publicité des participations compétente toute modification de la liste selon l'al. 6, let. a (art. 18 al. 7 OIMF-FINMA).

Dans les cas prévus à l'al. 3, l'instance pour la publicité des participations compétente peut demander en tout temps d'autres pièces attestant que les conditions de l'indépendance sont remplies et respectées (art. 18 al. 8 OIMF-FINMA).

Lors de déclarations de directions de fonds ou de sociétés de placements collectifs étrangers non autorisés à l'offre selon l'art. 18 al. 3 OIMF-FINMA, l'IPP vérifie uniquement si les documents exigés, c'est-à-dire la liste nominative de toutes les directions de fonds ou des sociétés et une déclaration attestant que les conditions d'indépendance selon les al. 3 et 5 sont remplies et respectées, ont été fournis.

Dans la pratique, l'IPP ne procède pas à un contrôle de l'exactitude matérielle des indications fournies (cf. rapport annuel de l'IPP 2011, p. 4 ss.).

Dans le cas présent, une évaluation matérielle est explicitement demandée.

[...]

L'IPP présume que la décision préalable dans le cas présent doit servir à la sécurité juridique et à faire face de manière proactive à d'éventuelles ambiguïtés.

L'IPP évalue donc si les conditions de l'art. 18 al. 3 OIMF-FINMA sont remplies, soit qu'il s'agit des placements collectifs étrangers qui ne dépendent pas d'un groupe et dont l'offre n'est pas autorisée. [...]..

Les Requérantes précisent que les produits mentionnés dans l'annexe 1 de la Demande sont des placements collectifs étrangers et qu'aucun des produits mentionnés dans cette liste n'est autorisé à être offert en Suisse selon la liste de la FINMA.

En outre, il ressort des allégations des Requérantes que, par la Transaction Envisagée, [J] sera "intégrée" dans [A]. Finalement, il reste donc à examiner si, après l'exécution de la Transaction Envisagée, [J] peut continuer à agir indépendamment du groupe.

En ce qui concerne l'indépendance personnelle, l'art. 18 al. 5 let. a OIMF-FINMA exige que les personnes de la direction du fonds ou de la société qui contrôlent l'exercice des droits de vote agissent indépendamment de la société mère du groupe et des sociétés qu'elle contrôle. Par exercice des droits de vote, il faut entendre la décision sur la manière d'exercer concrètement les droits de vote lors d'une assemblée générale (cf. rapport annuel de l'IPP 2011, p. 4 ss.).

Les Requérantes expliquent que le directoire d'une société de gestion telle que [J] détermine les orientations de l'activité et veille à leur mise en œuvre. Un nombre limité de décisions importantes nécessitent une approbation préalable du conseil de surveillance. Les décisions relatives à l'exercice des droits de vote des positions gérées ne font pas partie de ces décisions.

Les Requérantes précisent qu'après l'exécution de la Transaction Envisagée, la direction de [J] sera formée d'un directoire composé de huit directeurs, d'une part, et d'un conseil de surveillance composé de huit membres, d'autre part. Il est prévu que les membres du directoire soient nommés sur proposition de [B] et que [B] ait le droit de désigner jusqu'à cinq membres du conseil de surveillance. Une fois élus, les membres du directoire exerceront néanmoins les droits de vote concernant les participations gérées selon leur propre appréciation, sans être soumis aux directives de [B], [A], ou de toute autre personne. En leur qualité d'organe d'une société de gestion agréée par les Autorités du [pays J], les membres du directoire (au même titre que les autres employés de [J]) ont en effet l'obligation légale de gérer les portefeuilles dans l'intérêt exclusif des investisseurs. Ils ne peuvent en aucun cas accepter que leurs décisions à cet égard soient influencées par les intérêts de tiers.

Les Requérantes exposent que le Code de déontologie de [J] prévoit ainsi que l'organisation de la société doit garantir "*deux principes déontologiques fondamentaux*", à savoir (i) que "*la gestion de portefeuille [soit] réalisée exclusivement dans l'intérêt des porteurs et des mandats et ne jamais privilégier ceux d'un tiers*" et (ii) "*l'autonomie de la gestion*".

Selon les Requérantes, après l'exécution de la Transaction Envisagée, le directoire de [J] continuera d'exercer son activité de gestion — et, en particulier, de décider de la façon dont les droits de vote attachés aux participations détenues par les fonds gérés doivent être exercés — indépendamment de [B], de [A] ou de leurs actionnaires de contrôle, conformément à la réglementation du [pays J] et aux règles déontologiques applicables.

L'IPP confirme le raisonnement des Requérantes et estime que les explications fournies n'indiquent pas que l'indépendance personnelle ne peut pas être garantie. Certes, [B] peut mettre à disposition certains membres du directoire, mais rien n'indique que ces personnes auraient en outre une fonction chez [B] ou [A]. S'agissant d'un organe d'une société de gestion agréée par [les Autorités du pays J], les membres du directoire sont légalement tenus de gérer les portefeuilles dans l'intérêt exclusif des investisseurs et ne doivent en aucun cas permettre que leurs décisions en la matière soient influencées par les intérêts de tiers.

En conséquence, l'indépendance personnelle des organes dirigeants de [J] par rapport à [B] et [A] selon l'art. 18 al. 5 let. a chiffre 1 OIMF-FINMA peut être considérée comme prouvée par les explications et les documents fournis.

En ce qui concerne l'indépendance organisationnelle, la question fondamentale est de savoir dans quelle mesure la structure organisationnelle du groupe laisse une place à l'indépendance organisationnelle (cf. rapport annuel de l'IPP 2011, p. 4 ss.). L'art. 18 al. 5 let. b chiffre 1 OIMF-FINMA déclare tout de même qu'il n'y a pas d'indépendance lorsque les sociétés du groupe exercent une influence sur l'exercice des droits de vote « sous la forme des directives ou de toute autre manière ». En outre, l'échange et la circulation d'informations susceptibles d'influencer l'exercice des droits de vote doivent être interdits (art. 18 al. 5 let. b chiffre 2 OIMF-FINMA.).

Les Requérantes répètent que la réglementation et les règles de déontologie en vigueur au sein de [J] requièrent que la gestion des portefeuilles soit réalisée exclusivement dans l'intérêt des investisseurs et que l'autonomie de l'activité de gestion soit assurée et que le Code de déontologie

de [J] [...] précise à ce sujet que "*Les droits de vote doivent être librement exercés et [J] doit être en mesure de justifier en permanence la position qu'elle a adoptée en la matière*". Une intervention de [B], [A] ou de ses actionnaires de contrôle dans l'exercice des droits de vote contreviendrait ainsi tant à la réglementation [du pays J] applicable qu'aux règles internes de [J].

Par conséquent, de l'avis des Requérantes, l'organisation des Requérantes et de [J] permettent d'empêcher que les Requérantes interviennent sous la forme de directives ou de toute autre manière dans l'exercice des droits de vote par le directoire de [J].

L'IPP conclut que non seulement les règles en vigueur suppriment l'influence de [A], mais qu'il n'y a pas non plus de raison de craindre que cela puisse changer après la Transaction Envisagée – compte tenu du fait que [J] doit continuer à satisfaire aux exigences légales concernant la gestion des portefeuilles.

Les Requérantes démontrent que le Code de déontologie de [J] requiert que:

- pour prévenir d'éventuels conflits d'intérêts, [J] "[*mette] en place s'il y a eu lieu une organisation, des procédures, un dispositif de contrôle concernant la séparation des métiers et des fonctions dénommés 'murailles de Chine*". Ces derniers "*doivent notamment permettre une étanchéité entre les activités exercées au sein de la société de gestion ou de son groupe et donc de réduire les risques de conflits d'intérêts. Leur efficacité doit faire l'objet d'un contrôle périodique*", et
- l'accès aux fichiers informatiques concernant les portefeuilles [...] soit "*réservé à des personnes habilitées*", la confidentialité devant être garantie "*par des procédures comportant des dispositifs d'accès sécurisés*".

Enfin, les Requérantes soulignent que la Norme de déontologie de [J] rappelle que "*(t)ous les collaborateurs de [J] et ses prestataires sont soumis au respect de la confidentialité et du secret professionnel*", que *"[c]ette obligation de discrétion couvre les informations portées à leur connaissance dans l'exercice de leurs missions et qui portent notamment sur l'organisation de [J], ses objectifs stratégiques, sa situation financière, les portefeuilles gérés et, bien entendu, la situation des clients réels et potentiels*" ."*Chaque collaborateur doit être particulièrement vigilant lors de ses contacts externes ou internes au Groupe, à ne pas divulguer d'informations confidentielles ou relevant du secret professionnel*".

Les Requérantes font valoir que la Norme de déontologie de [J] indique que le devoir de confidentialité ne s'applique pas dans les relations avec certains tiers, à savoir (i) les autorités publiques compétentes telles que [les Autorités du pays J], (ii) des commissaires aux comptes ou des collaborateurs de la direction de l'audit du groupe [J]. Aucune exception au devoir de confidentialité n'est prévue en faveur d'éventuels actionnaires de contrôle de [J].

L'IPP constate que les explications fournies n'indiquent pas que l'indépendance organisationnelle ne peut pas être garantie. Au contraire, les documents soumis montrent qu'il existe différentes approches pour garantir que les informations ne soient communiquées qu'à ceux qui peuvent faire valoir un droit à cet égard.

En résumé, l'indépendance organisationnelle des organes dirigeants de [J] par rapport à [B] et [A] selon l'art. 18 al. 5 let. b chiffre 1 et 2 OIMF-FINMA peut être considérée comme prouvée par les explications et les documents fournis.

L'IPP constate compte tenu des faits exposés que [J], ainsi que l'ensemble des fonds gérés par [J], ne dépendent pas de [B] ou de [A] au sens de l'art. 18 al. 3 OIMF-FINMA et que les organes dirigeants de [J] remplissent les critères d'indépendance de l'art. 18 al. 5 OIMF-FINMA.

[...]

3.3. Statistische Angaben zu den Empfehlungen

Im Berichtsjahr 2021 gingen insgesamt sechs Gesuche bei der Offenlegungsstelle ein. Davon konnten vier Gesuche um Ausnahmen/Erleichterungen sowie ein Gesuch um Vorabentscheid durch den Erlass einer Empfehlung erledigt werden. Diese fünf Empfehlungen sind in Rechtskraft erwachsen, zumal weder die Offenlegungsstelle die FINMA um einen Entscheid ersucht hat (vgl. Art. 28 Abs. 4 lit. c FinfraV-FINMA), noch die Gesuchsteller die Empfehlungen abgelehnt oder missachtet haben (vgl. Art. 28 Abs. 4 lit. b FinfraV-FINMA) und auch die FINMA keine dieser Angelegenheiten zum Entscheid an sich gezogen hat (vgl. Art. 28 Abs. 4 lit. a FinfraV-FINMA).

Ein Gesuch um Vorabentscheid bzw. Ausnahmen/Erleichterungen hat die FINMA hingegen zum Entscheid an sich gezogen (vgl. Art. 28 Abs. 4 lit. a FinfraV-FINMA).

4. Offenlegungsmeldungen

4.1. Anzahl Offenlegungsmeldungen

Im Berichtsjahr 2021 gingen bei der Offenlegungsstelle insgesamt 1'546 Meldungen ein.

	Meldungen 2019	Meldungen 2020	Meldungen 2021
Januar	124	130	142
Februar	108	129	138
März	95	209	162
April	143	199	139
Mai	120	168	142
Juni	113	197	123
Juli	142	184	111
August	120	153	83
September	95	230	154
Oktober	129	182	88
November	138	176	119
Dezember	138	160	145
Total	**1'465**	**2'117**	**1'546**

Tabelle 1: Anzahl der eingegangenen Meldungen je Monat

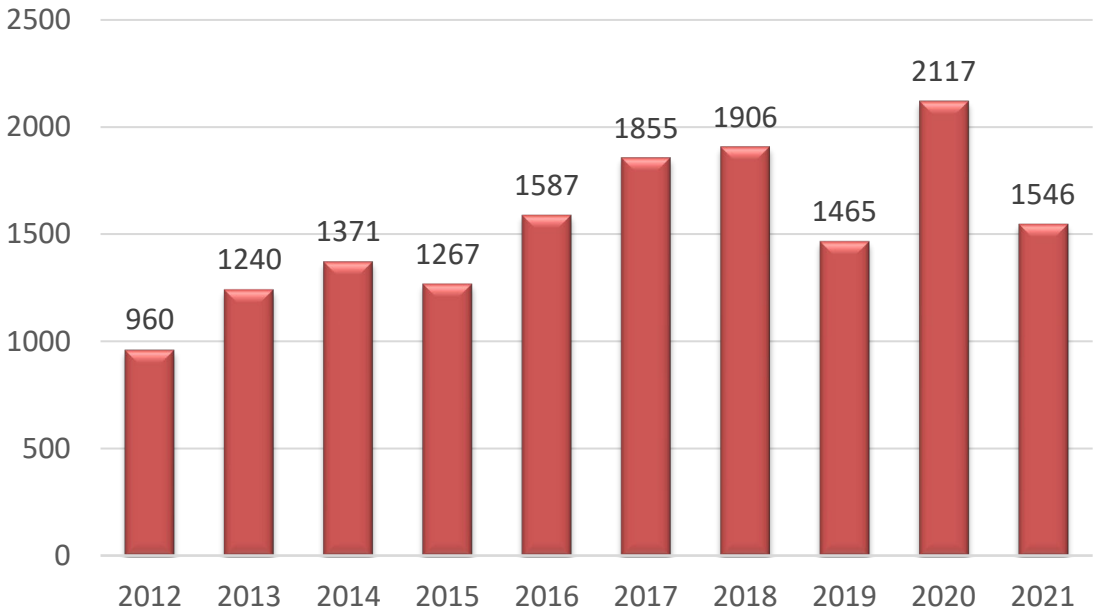

Tabelle 2: Anzahl eingegangener Offenlegungsmeldungen im Jahresvergleich

4.2. Potenzielle Meldepflichtverletzungen

Der FINMA kommt von Gesetzes wegen die Aufsicht über die Einhaltung der Offenlegungspflichten zu. Haben die Offenlegungsstelle oder die Emittenten Grund zur Annahme, ein Aktionär sei der Meldepflicht nicht nachgekommen, teilen sie dies der FINMA mit (Art. 122 FinfraG).

Die Offenlegungsstelle verfügt nicht über hoheitliche Kompetenzen und führt daher keine Untersuchungen durch. Im Gegensatz zur FINMA hat sie somit rechtlich keine Möglichkeiten, einen Verdacht detailliert abzuklären. Gelangt die für administrative Massnahmen zuständige FINMA zur Auffassung, es liege ein strafbarer Verstoss gegen das FinfraG vor, stellt sie die Unterlagen dem Eidgenössischen Finanzdepartement EFD zur Beurteilung zu.

5. Gebühren

Gestützt auf Art. 27 Abs. 4 FinfraV-FINMA kann die Offenlegungsstelle für die im Auftrag der FINMA zu erfüllenden Aufgaben und für die Bearbeitung der Gesuche eine angemessene Entschädigung verlangen. Für die Bearbeitung der Gesuche um Ausnahmen und Erleichterungen von der Meldepflicht bzw. um Vorabentscheid wurden den Gesuchstellern je nach Komplexität, Zeitaufwand und Dringlichkeit Gebühren bis zu CHF 25‘000.00 in Rechnung gestellt. Im Berichtsjahr wurden für die sechs Empfehlungen Gebühren in der Höhe von insgesamt CHF 69'500 in Rechnung gestellt. Die Einnahmen aus den Gebühren für die Bearbeitung der Ausnahmegesuche und Vorabentscheide deckten den Aufwand der Offenlegungsstelle bei weitem nicht.

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IMPRESSUM

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