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Remarks regarding the Fulfilment of the Notification Obligation in case of a Capital Increase and Simplified Disclosure of Lock-Up Groups

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Summary

Fulfilment of the notification obligations of shareholders in case of a capital increase

Where shareholders receive subscription rights immediately as a result of their shareholder status and corresponding to their existing participation (original acquisition), the subscription rights will not be subject to the disclosure obligation. The sale of originally acquired subscription rights is also not subject to notification. Finally, when a shareholder exercises originally acquired subscription rights in advance, this will also not trigger any notification obligation. In principle, the company is not required to disclose the issuance of such subscription rights as sale positions pursuant to Art. 14, para. 1, letter b FMIO-FINMA[1].

The derivative acquisition of subscription rights, and the sale of derivatively acquired subscription rights, will trigger a disclosure obligation if it results in a threshold being reached, fallen below or exceeded pursuant to Art. 120, para. 1 FMIA[2].

Simplified disclosure of lock-up groups

Lock-up groups may forego the full disclosure of all group members provided certain requirements are met. If such requirements are not met, then all members of the group must be fully disclosed. A request for exemptions and easing provisions pursuant to Art. 26 FMIO-FINMA remains reserved. The issuer must publish notifications from lock-up groups via the electronic publication platform.

1 Subscription rights in case of capital increases

Pursuant to Art. 652b, para. 1 of the Swiss Code of Obligations[3], subscription rights give every shareholder the right to the proportion of the newly issued shares that corresponds to their existing participation. They therefore implement the right of the shareholder to maintain the amount of their shareholding. Where a shareholder receives subscription rights immediately as a result of their shareholder status and corresponding to their existing participation in line with their current shareholding amount (original acquisition), which is the case in the event of a capital increase by means of underwriting by a bank consortium while maintaining the subscription rights, this will not be subject to the disclosure obligation because the subscription right merely represents the consequence of a capital increase foreseen by the legislator and, ultimately, in other words, once the capital increase has been implemented, it does not change the shareholding amount of the shareholder in any way if the latter actually exercises the subscription rights. In principle, the company is not required to disclose the issuance of such subscription rights as sale positions pursuant to Art. 14, para. 1, letter b FMIO-FINMA. Like the original acquisition of subscription rights, the sale of originally acquired subscription rights does not trigger any notification obligation either. When a shareholder exercises in advance originally acquired subscription rights, this will also not give rise to any notification obligation. Whereas, if a shareholder acquires shares for which the subscription rights will not be exercised, this can trigger a notification obligation.

On the other hand, a derivative acquisition of subscription rights, e.g. within a subscription rights trade on the SIX Swiss Exchange, will trigger a disclosure obligation if it causes the thresholds set out in Art. 120, para. 1 FMIA to be reached or exceeded. If a disclosure obligation is triggered by a derivative acquisition,

[1] Ordinance of the Swiss Financial Market Supervisory Authority on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FINMA Financial Market Infrastructure Ordinance, FMIO-FINMA) of 3 December 2015 (CC 958.111).
[2] Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act, FMIA) of 19 June 2015 (CC 958.1).
[3] Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911 (CC 220).

any originally acquired subscription rights need not be disclosed in the corresponding notification. For companies with their registered office in Switzerland, according to Art. 14, para. 2 FMIO-FINMA, the total number of voting rights entered in the commercial register upon conclusion of the binding transaction will form the basis for calculating the positions requiring notification. For companies with their registered office abroad, publication in accordance with Art. 115, para. 3 FMIO[4] will apply (see also Disclosure Office Notice I/13 dated 30 April 2013 - Amended version of 20 September 2018).

2 Simplified disclosure of lock-up groups

2.1 Lock-up agreements can establish groups

Any party who coordinates their conduct regarding the acquisition or disposal of shareholdings or the exercising of voting rights with third parties by contract, other organised arrangement or by law, is acting in concert or as an organised group (Art. 12, para. 1 FMIO-FINMA).

If shareholders conclude parallel (vertical) lock-up agreements with a third party, these are equivalent to the conclusion of an agreement between the shareholders because the conduct of the shareholders regarding the disposal of acquisition rights has been coordinated. According to standard practice by the disclosure office and FINMA, this leads to a group notification obligation as defined in Art. 12 FMIO-FINMA in conjunction with Art. 120, para. 1 and Art. 121 FMIA.

2.2 Handling of unrestricted equity securities and equity derivatives

If shareholders forming a group on account of lock-up obligations they have entered into hold or acquire additional equity securities or derivatives that are not subject to any lock-up period, the question is, how should unrestricted equity securities and equity derivatives be handled. Such unrestricted equity securities and equity derivatives are not to be attributed to the portfolio of the group. Only equity securities and equity derivatives that may not be sold for a certain period are to be attributed to the portfolio of a lock-up group.

This raises the question of whether the equity securities and equity derivatives held outside the group must be disclosed additionally with the restricted equity securities and equity derivatives held by the respective group member, or separately and only once a voting rights threshold of 3 percent has been reached by the unrestricted equity securities and equity derivatives.

If individual group members were subject to an individual notification obligation for their restricted and unrestricted equity securities and equity derivatives as a whole (in addition to the notification obligation as a group member), their restricted equity securities and equity derivatives would be reported twice, once in the group notification but also in the individual notification. The duplicate notification of equity securities or derivatives is not only not provided for in Art. 120, para. 1 FMIA, but it is also not useful in terms of the desired transparency (Art. 1, para. 2 FMIA).

With this in mind, members of the lock-up group will be subject to a notification obligation for equity securities and equity derivatives held outside the group separately from the restricted equity securities and equity derivatives. Unrestricted equity securities and equity derivatives will thus only be subject to notification once voting rights of 3 percent are reached or exceeded, and the voting share is calculated without including the restricted equity securities and equity derivatives. To avoid misunderstandings, a corresponding individual notification should include a note stating that these are unrestricted equity securities

[4] Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Ordinance, FMIO) of 25 November 2015 (CC 958.11).

and equity derivatives held outside the lock-up group. Reference should also be made to the disclosure notification of the lock-up group that the shareholder is a member of.

2.3 Easing provisions for lock-up groups

The disclosure of all shareholders belonging to a lock-up group can be extremely difficult in practice because they may, particularly when shares allotted to employees are also subject to a lock-up period, involve groups with hundreds, or even thousands, of members. In addition, any change to the composition of the group once again triggers a notification obligation (see Art. 12, para. 3 FMIO-FINMA).

Simplifying the notification obligation is thus justified, in particular when the accompanying requirements ensure that transparency is improved overall. For this simplification of the disclosure obligation in respect of lock-up groups, this requires the group to notify additional information. With this in mind, simplification of the obligation to disclose all members of lock-up groups may then be used when those members of the lock-up group whose individual shareholding represents 3 percent or more of the voting rights are disclosed stating their surname, first name and place of residence, or company name and registered office, and with an indication of the percentage share of their (individual) shareholding.

2.4 Notification scheme for the simplified disclosure of lock-up groups

On these grounds, lock-up groups may forego full disclosure of all group members providing the following requirements are met:

- the precise duration of the lock-up obligation (with specification of exact end date) and the counterparty (e.g. the issuer or the bank consortium) must be disclosed;
- the number of group members, the type and quantity of equity securities and equity derivatives held by the group in total, the total voting share, and the group's representatives are to be reported;
- mentioning by name those group members who individually hold a voting share, directly or indirectly, of less than 3 percent in the company, and details of their place of residence or registered office, may be omitted;
- group members who, directly or indirectly, hold a voting share of 3 percent of the voting rights or more, must be reported stating their surname, first name and place of residence or company name and registered office, along with details on the voting shares attributable to them. In the event of their shareholdings subsequently reaching, falling below or exceeding a threshold under Art. 120, para. 1 FIMA, this will once again trigger a group notification obligation. A notification obligation will also be triggered when the voting share of a group member that is covered by the lock-up obligation, reaches or exceeds the threshold of 3 percent or more of the voting rights during the lock-up obligation period;
- in the event of a notification obligation arising during the lock-up obligation period, the notification and publication must include the complete and up-to-date information in accordance with this notice. Changes in the composition of the group (Art. 12, para. 3 FMIO-FINMA) must then be disclosed and published when group members to whom a voting share of 3 percent or more of the voting rights is attributable join or leave the group during the lock-up obligation period;
- group members will be subject to a notification obligation for equity securities and equity derivatives held outside the group separately from the restricted equity securities and equity derivatives. These unrestricted equity securities and equity derivatives therefore only need to be reported when amounting to 3 percent or more of the voting rights. A corresponding notification must indicate that these are unrestricted equity securities and equity derivatives held outside the group and include a reference to the disclosure notification of the lock-up group that the shareholder is a member of;

- expiry of the lock-up period will trigger a notification obligation for the group and the group must report falling below of the threshold of 3 percent of the voting rights;
- those shareholders whose individual shareholdings reach or exceed the 3 percent of the voting rights threshold due to dissolution of the lock-up group must report this to the company and the disclosure office within four trading days at the latest following dissolution of the lock-up group in accordance with the provisions of FMIO-FINMA. Shareholders who have not already individually disclosed their unrestricted positions during the lock-up obligation period (see above) will also be subject to a notification obligation if their shareholdings reach or exceed a threshold after expiry of the lock-up agreement. Once again in this case, the notification must be submitted to the company and the disclosure office within four trading days at the latest following dissolution of the lock-up group in accordance with the provisions of FMIO-FINMA.

If these requirements are not met, then all members of the group must be fully disclosed. A request for exemptions and easing provisions pursuant to Art. 123, para. 2 FMIA in conjunction with Art. 26 FMIO-FINMA remains reserved.

These easing provisions regarding the disclosure of lock-up groups apply to lock-up groups disclosed by means of a notification to the company and the disclosure office (Art. 24, para. 1 FMIO-FINMA).

The issuer must publish lock-up group notifications via the electronic publication platform;. the publication pursuant to Art. 24, para. 3 FMIO-FINMA must take place within two trading days following receipt of the notification by the company.

If lock-up groups shall be disclosed in the prospectus, an application for exemptions and easing provisions pursuant to Art. 123, para. 2 FMIA in conjunction with Art. 26 FMIO-FINMA must be submitted.

This notice has been brought to the attention of the Swiss Financial Market Supervisory Authority FINMA prior to publication.