

Disclosure Office Notice

I/18

Notification Duty of Person with Discretionary Power to Exercise Voting Rights Pursuant to Art. 120, para. 3 FMIA

Date of 20 September 2018

Summary:

Anyone who has the discretionary power to exercise the voting rights associated with equity securities and is situated outside the chain of control of the beneficial owners of the equity securities, is subject to the notification duty in accordance with Art. 120, para. 3 FMIA.

In case of direct or indirect control [of the party who has discretionary power to exercise voting rights], the notification duty may alternatively be met, at the discretion of such party, by the controlling person («the last link in the chain») on a consolidated basis (Art. 10, para. 2 FMIO-FINMA).

Art. 120, para. 3 FMIA does not apply to equity derivatives.

1. Introduction

Art. 120, para. 3 FMIA introduced an additional statutory notification duty for individuals with the discretionary power to exercise voting rights (in parallel with the notification duty of the beneficial owner under Art. 120, para. 1 FMIA in conjunction with Art. 10, para. 1 FMIO-FINMA).

The notification duties under Art. 120, para. 1 FMIA and Art. 120, para. 3 FMIA exist independently from one another.¹ Thus, the beneficial owner will always be subject to a notification duty regardless of whether or not another person has the discretionary power to exercise voting rights according to Art. 120, para. 3 FMIA.

Regarding the provision on collective investment schemes in Art. 18 FMIO-FINMA, it should be noted that the corresponding notification duty is set out in Art. 120, para. 1 FMIA (see Art. 18, para. 1 FMIO-FINMA: «The reporting obligations under Article 120, paragraph 1 FMIA [...]»). Art. 120, para. 3 FMIA may therefore apply in parallel to shareholdings held by collective investment schemes (for example when a fund management company delegates the discretionary power to exercise voting rights to a person outside its chain of control).

2. Requirements of Art. 120, para. 3 FMIA

(i) Discretionary power to exercise voting rights

The term «discretionary» requires the delegated power to exercise voting rights to encompass not only the legal «ability» but also the legal «authorisation».² This means that there is no discretionary power to exercise voting rights, as defined by Art. 120, para. 3 FMIA, if the beneficial owner gives instructions on how to exercise said voting rights.³

In particular, a person will have discretionary power to exercise voting rights where they are able to exercise said voting rights without consulting the beneficial owner, where they are not bound by the proposals of the Board of Directors of the company whose shares are listed, and where they have no other instructions to follow.

If the beneficial owner granting the authorisation to exercise voting rights to a third party influences the exercise of said voting rights with instructions, that third party will not have discretionary power. In such cases, there will be no notification duty for the party authorised to exercise voting rights.

¹ FINMA report regarding the consultation from 20 August to 2 October 2015 on the FMIO-FINMA draft (Bericht der FINMA über die Anhörung vom 20. August bis 2. Oktober 2015 zum Entwurf der FinfraV-FINMA), page 19.

² FINMA report regarding the consultation from 20 August to 2 October 2015 on the FMIO-FINMA draft (Bericht der FINMA über die Anhörung vom 20. August bis 2. Oktober 2015 zum Entwurf der FinfraV-FINMA), page 22.

³ FINMA report regarding the consultation from 20 August to 2 October 2015 on the FMIO-FINMA draft (Bericht der FINMA über die Anhörung vom 20. August bis 2. Oktober 2015 zum Entwurf der FinfraV-FINMA), page 22.

(ii) Person outside chain of control of the beneficial owner

In accordance with Art. 10, para. 2 FMIO-FINMA, one of the requirements for a notification duty is that voting rights are not exercised directly or indirectly by the beneficial owner. This means that the notification duty under Art. 120, para. 3 FMIA can only exist for persons outside the chain of control of the beneficial owner.⁴

For example, if the voting rights are exercised by a subsidiary of the beneficial owner, there will be no notification duty under Art. 120, para. 3 FMIA. The beneficial owner can therefore freely delegate the voting rights within its own group without triggering notification duties.

3. Party subject to the notification duty (Art. 10, para. 2 FMIO-FINMA)

Anyone who may actually make a decision regarding exercising the voting rights will be subject to the notification duty pursuant to Art. 120, para. 3 FMIA.⁵ This means that the party to whom powers to exercise the voting rights have been formally assigned will not automatically be subject to the notification duty.⁶ In particular, where such party is directly or indirectly controlled (group relationship), it will be necessary to consider with whom the discretion to exercise the rights in question actually lies.

Where the party to whom power to exercise the voting rights has been formally assigned is directly or indirectly controlled, the notification duty may alternatively be met by the controlling person («the last link in the chain») on a consolidated basis (Art. 10, para. 2 FMIO-FINMA) at the discretion of such party. This means that all other voting rights for the same issuer that controlled companies have discretionary power to exercise, and any other positions (equity securities and equity derivatives), must be reported by the controlling person on an aggregated and consolidated basis.

Consolidated notifications must be marked as such (see the extract from the notification form provided by the disclosure office below):

In the case of a notification according to art. 120 para. 3 FMIA (see also part 4 item 3):
The notification is made on a consolidated basis within the meaning of art. 10 para. 2 sentences 2 and 3 FMIO-FINMA.

Yes, on a consolidated basis. No, the notification is made by the person who decides how voting rights are exercised.

A consolidated notification by the controlling person will exempt the controlled companies from their notification duty and they will no longer need to disclose internal impacts on thresholds. Switching back to an unconsolidated notification system may also require a disclosure notification by the controlling person (notification of voting rights falling below 3 percent).⁷

4. Creation of the notification duty

In case of a voting rights notification pursuant to Art. 120, para. 3 FMIA, this is not a notification based on an acquisition or sale transaction, hence Art. 13, para. 1 FMIO-FINMA is not relevant.

⁴ FINMA report regarding the consultation from 20 August to 2 October 2015 on the FMIO-FINMA draft (Bericht der FINMA über die Anhörung vom 20. August bis 2. Oktober 2015 zum Entwurf der FinfraV-FINMA), page 21.

⁵ Explanatory report on the partial revision of the FMIO-FINMA dated 22 August 2016 (Erläuterungsbericht zur Teilrevision der FinfraV-FINMA vom 22. August 2016), page 4.

⁶ Explanatory report on the partial revision of the FMIO-FINMA dated 22 August 2016 (Erläuterungsbericht zur Teilrevision der FinfraV-FINMA vom 22. August 2016), page 4.

⁷ FINMA report regarding the consultation from 22 August to 3 October 2016 on the partial revision of the FMIO-FINMA (Bericht der FINMA über die Anhörung vom 22. August bis 3. Oktober 2016 zur Teilrevision der FinfraV-FINMA), page 10.

Completion of the binding transaction is therefore not generally considered as the point at which the notification duty arises.

Art. 120, para. 3 FMIA only applies once voting rights may actually be exercised. In other words, the time at which the contract is concluded will not be relevant in terms of the emergence of the notification duty. Instead, the time from which such a discretionary authorisation to exercise the voting rights exists and may also actually be exercised at a general meeting, for example, will apply.

A one-off authorisation to exercise voting rights at a general meeting will not give rise to a notification duty (see Art. 120, para. 5 FMIA).⁸

The following should be noted in relation to pledge agreements: The pledging of equity securities is not expressly regulated within FMIO-FINMA. Upon the conclusion of a pledge agreement regarding registered shares, a notification duty does not usually arise for either party providing the pledgee is not authorised to exercise the voting rights.

If the pledgee does have the discretionary power to exercise the voting rights (for example, if a certain event occurs), Art. 120, para. 3 FMIA may apply and a notification duty may arise (alongside the continuing notification duty for the pledger pursuant to Art. 120, para. 1 FMIA) for the pledgee upon the emergence of this actual discretionary power to exercise the voting rights.

5. Content of the notifications

Equity derivatives do not confer any voting rights as long as they are not exercised and shares are not purchased in this way. For this reason, it is not possible for a third party to have discretionary power to exercise voting rights in respect of equity derivatives as defined in Art. 15 FMIO-FINMA. Art. 120, para. 3 FMIA therefore does not apply to equity derivatives, but to shares and other holdings equivalent to shares.



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

⁸ FINMA report regarding the consultation from 20 August to 2 October 2015 on the FMIO-FINMA draft (Bericht der FINMA über die Anhörung vom 20. August bis 2. Oktober 2015 zum Entwurf der FinfraV-FINMA), page 22.