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Note from the Editors
The draft bill for revised Financial Market Infrastructure Act: A shift of paradigm without basis

Reference: CapLaw-2024-80

A shift of paradigm in legislation is normally triggered by flaws or loopholes in the substance of the existing legislation. Looking at the draft bill for the revision of the Financial Market Infrastructure Act (FMIA), this does not seem to apply to the Swiss government, which proposes to change the current regime of disclosure obligations of Swiss listed companies for the sake of changing it from self-regulation to government regulation.

As described in more detail in this edition of CapLaw, the Swiss legislator proposes *inter alia* to transfer the provisions governing the obligation to disclose price-sensitive information (ad hoc disclosure) and to report transactions of its management and its board of directors in shares and other equity securities (management transactions) from the self-regulation of stock exchanges to governmental legislation. The proposed rules are not only a shift of paradigm, but also a clear divergence of the core principle of self-regulation for trading venues stipulated in article 27 of the FMIA). The explanatory report of the Swiss Federal Department of Finance makes it clear that the only major shortcoming of the existing regulation, in the department's opinion, is the fact that it was enacted by the stock exchanges themselves rather than the government.

The proposed change of regulation is explained as follows: "*To strengthen the reputation of the financial centre, it is necessary to take measures to improve the prevention, detection and sanctioning of market-abusive conduct. This can be done in particular by transferring issuer obligations that are important for market integrity from the self-regulation of trading venues to government law.*" (Amendment to FMIA, Explanatory Report (Erläuternder Bericht zur Vernehmlassung, Berne 19 Juni 2024 (p. 8)).

We are not aware of any allegations from abroad or within Switzerland that the current regime of self-regulation of issuer obligations, which appears to be the predominant regime worldwide outside the EU, has negatively impacted the reputation of the Swiss financial center. To the contrary, such reputation has rather been impacted by events like the allegations of money laundering against private banks or allegations of non-compliance with sanctions and anti-terrorist funding regulations of certain Swiss banks or – at least for some – also the write-down of AT1 bonds of Credit Suisse in the context of its merger with UBS. Banks and other institutions supervised by Federal regulators pursuant to governmental laws have been at the center stage of such allegations. No events or shortcomings with a comparable impact on the reputation of the Swiss financial center have been reported in the realm of the

self-regulated supervision of listed companies. Yet, the government tries to portray the transfer to government regulation as a key necessity to safeguard the reputation of the Swiss financial center.

In the government's view, ad hoc disclosure and the reporting of management transactions seem to be the cornerstones of market integrity on trading venues. However, they are not. Market integrity on trading venues is safeguarded by insider trading and market abuse prohibitions. While we believe the Swiss insider trading prohibition does not need a "stringency" overhaul, we see room for more rigor in the criminal offense of market manipulation whose scope should cover a broader set of patterns of market abuse. This could and should be addressed before dropping the current regime of self-regulation absent a sound basis. In contrast, the underlying purpose of ad hoc disclosure and the reporting of management transactions is to bring all interested market participants to the same level of information, i.e. shall ensure market efficiency. And even if ad hoc disclosure and market manipulation were, in addition to market efficiency, indeed the key elements of market integrity: why could such integrity not be safeguarded by a self-regulatory regime? Again, the explanatory report accompanying the draft bill for the revision of the FMIA fails to detail any shortcomings of the current regime.

The Swiss government appears to look to the European Union as sole role model where there is no room for self regulation in the thicket of financial market regulation. Regulation and the costs associated therewith are considered the main driver for de-listings, which in recent years have outnumbered listings significantly also in Switzerland. Yet, rather than enacting legislation or other measures to counter this trend, the government prefers to add another layer of regulation to an ever smaller number of entities to be regulated as a result of such regulation.

Sadly, one must conclude that an implied "superiority" of governmental legislation vis-à-vis self-regulation seems to have been the guiding principle for a shift of paradigm in Swiss financial market infrastructure regulation. Whether or not there is a need for such change appears to be irrelevant. Yet, self-regulation is not a weakness or even an illness that needs to be cured. On the contrary, the ability of a market to self-regulate is a strength in our view.

The editors

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Proposed Provisions regarding Insider Lists and Management Transactions – Critical View on a Proposed Shift in Paradigm

Reference: CapLaw-2024-81

The draft changes proposed in the consultation on the amendment to the Financial Market Infrastructure Act (FMIA) seek to transfer issuer obligations from self-regulation by the stock exchange(s) to the FMIA and, associated with such transfer, the assignment of competencies from Swiss stock exchanges to FINMA. Among these issuer duties is the obligation to report management transactions. In addition, an explicit issuer obligation to maintain insider lists is introduced into the FMIA. The proposed changes would, if enacted, constitute a shift of paradigm in issuer regulation in Switzerland: The tradition of self-regulation of stock exchanges would cave in favor of governmental supervision along the EU model.

By Sandro Fehlmann / Thomas Reutter

1) Introduction

The draft legislation proposed by the Swiss Federal Council to amend the Financial Market Infrastructure Act (Draft-FMIA) includes several obligations of Swiss issuers of securities that, up until now, were governed by the relevant self-regulatory framework of the respective Swiss stock exchanges. Among these duties is the obligation to report management transactions (art. 37c Draft-FMIA) which is sometimes also referred to as reporting of "directors' dealings". The rule is intended to provide market participants with information on the trading by "insiders", i.e. members of the management and the board of directors of an issuer. In addition, the proposed revision of FMIA also includes a duty to prepare insider lists (art. 37a Draft-FMIA). Under the self-regulatory framework of Swiss stock exchanges such a duty is currently not expressly stipulated, but clearly considered "best practice" and a pre-requisite of a legitimate postponement of the disclosure of price-sensitive (ad hoc relevant) information by an issuer. However, non-compliance with such duty is currently not directly sanctioned.

2) Self-regulation vs. government regulation

On a more general note, we question the plan to abolish self-regulation in the area of issuer obligations and advocate retaining the current self-regulatory regime. In our view, several compelling reasons speak in favor of the current tried and tested system. Furthermore, the change of system would de facto largely abolish the concept of self-regulation laid down in art. 27 FMIA. Due to its history and its lack of experience and affinity in this area, we also do not consider FINMA to be suitable for supervising issuers.

Self-regulation in this area has proven its worth and the existing regulation was even considered equivalent by the EU. The EU Commission refused to recognize Swiss regulation not because of the technical regulation in the FMIA or the self-regulation by the stock exchange, but because the framework agreement between Switzerland and the EU did not materialize. Furthermore, there are numerous other jurisdictions that also recognize the principle of self-regulation, not least the United States – the Swiss regime is therefore not unique.

From an enforcement perspective in particular, we believe that self-regulation and the sanctioning of issuers through contractual penalties provided for in the listing rules, among other things, are much more suitable than the instruments of supervisory law. Criminal law (including administrative criminal law) focuses in particular on the individual liability of natural persons. However, wrongdoing in maintaining insider lists or the publication of management transactions is usually the result of "operational accidents" rather than the conspiracy of criminal employees. Accordingly, the penalization of individuals due to violations of issuer obligations seems disproportionate and inappropriate to us, as the decision as to whether and when an insider list is prepared and maintained, for example, is not made by one person, but is usually decided by a committee.

Instead of supervising new issuers, we believe that FINMA's resources would be better used if it were to focus on the supervision of financial institutions and intermediaries currently supervised by FINMA instead of expanding the scope of state supervision. If self-regulation is being questioned, which in our view should not be the case, this paradigm shift should be prioritized in the core areas of financial market supervision, e.g. in the supervision of financial institutions and financial intermediaries, instead of making issuers that were not previously supervised by FINMA (except to a limited extent like all other market participants in the area of combating market abuse) subject to FINMA supervision.

3) Insider Lists (art. 37a Draft-FMIA)

The scope of the obligation to maintain insider lists is aimed at issuers on a Swiss stock exchange or a Swiss DLT trading facility and their agents. The same applies under EU law, where issuers and persons acting on their behalf or for their account are obliged to maintain an insider list. It should be noted that the issuer or the person acting on its behalf or for its account is not released from its obligation if or to the extent that any of the other addressees of the duty maintains such list.

Art. 37a para. 3 Draft-FMIA stipulates that the Federal Council may provide for exceptions to the obligation on grounds of proportionality. However, further details are still lacking. In our opinion, the fact that lawyers may also be considered "agents" in the meaning of art. 37a Draft-FMIA triggering the duty to maintain such list is problematic. The question arises as to what extent attorney-client privilege typically precludes the disclosure of such insider lists (being an information that has been entrusted to the attorney because it has

provided typical legal services). It remains to be seen whether the respective authorities will use attorneys and other service providers benefitting from a privileged information exchange as "civil servants" and requesting the disclosure of insider lists.

While the EU has a prescribed format for insider lists and requires that they be kept electronically (art. 2 of the Commission Implementing Regulation (EU) 2016/347), there is no corresponding regulation in the draft legislation. The modalities will still have to be determined by the Federal Council, even though it seems highly likely that the implementing rules will require the list to be kept electronically.

The insider list must include all persons who have authorized access to insider information. The wording is similar to that of EU legislation. EU legislation specifies that the persons to be included on the insider list are those who, on the basis of an employment contract or otherwise, perform tasks for the issuer that give them access to insider information, such as advisors, accountants or rating agencies (art. 18 para. 1 let. a MAR). The content requirements for the entries on the insider list remain open at present and have yet to be determined by the Federal Council. In the EU, art. 18 para. 3 MAR provides certain minimum requirements (identity of all persons including the national identification number, reason for inclusion, date and time when this person received the information, date of creation of the list). In case the proposed changes will be enacted, we would encourage the government – who will be competent to draft the implementing legislation – to abstain from making (too many) formal requirements. Such formal requirements include e.g. the obligations that the persons covered must provide written acknowledgement (art. 18 para. 2 MAR).

While EU law stipulates a minimum retention period of 5 years (art. 18 para. 5 MAR) and the lists are to be destroyed after 5 years due to data protection regulations, the draft legislation provides for a minimum retention period of 15 years. This period is allegedly warranted for the purpose of criminal prosecution according to the draft proposal. In our view, the fifteen-year retention requirement is disproportionately long, particularly in comparison with the EU. It goes significantly further than the general document retention requirement under art. 958f of the Swiss Code of Obligations (see also art. 730c para. 1, art. 747 of the Swiss Code of Obligations) or the retention requirements of art. 7 para. 3 of the Anti-Money Laundering Act and the corporate law obligations to identify the beneficial owners (art. 686 para. 5, art. 697f para. 3 of the Swiss Code of Obligations).

Keeping insider lists is already considered best practice and enables issuers and their advisors to prove that the disclosure of inside information was made in accordance with art. 128 FMIO and that they have taken appropriate measures to ensure the confidentiality of inside information in connection with a postponement in ad hoc publicity. We, therefore, consider a corresponding explicit obligation to be redundant and, in particular for small and medium-sized issuers, to be disproportionately formalistic. In addition, the Draft-FMIA stipulates that all issuers of securities on a Swiss stock exchange or a Swiss DLT trading facility are obliged to maintain such insider lists. In the event that this requirement

is maintained, we believe, in the interests of proportionality, that it should be limited to companies that have issued equity securities.

The draft legislation provides for criminal liability for violating the obligation to maintain insider lists. Not only the intentional breach of the obligation but also mere negligence is punishable. While the breach of the obligation is only punishable by a fine, which means that it is just a contravention, the provision provides for a fine of up to CHF 500,000 or 100,000 in case of negligence resulting in an entry in the criminal record and potentially further consequences. Before 2018, the Swiss parliament explicitly rejected criminal negligence under the FinSA. Punishment for negligent behavior in such an administrative matter seems disproportionate in view of the above. In case of any enforcement proceedings, issuers that fail to maintain a proper insider list are already today factually disadvantaged by a failure to meet the burden of appropriate measures to ensure the confidentiality – this by itself is in our view incentive enough to maintain state-of-the-art insider lists. Further, many jurisdictions, including the United States, do not require issuers to maintain such lists. All these reasons lead to the conclusion that punishment of negligent behavior should be dropped in our opinion.

4) Reporting of Management Transactions (art. 37c Draft-FMIA)

Art. 37c Draft-FMIA primarily applies to transactions conducted by the board of directors and senior management of companies with securities traded on a Swiss stock exchange (or a Swiss DLT trading system) in such securities. Transactions that involve trading in securities of the listed company or in derivatives with any such securities as underlying are generally reportable and will be published indicating the generic function (e.g. member of management) but neither the specific role nor the name of the person trading.

The federal government enacting any implementing legislation would yet have to determine the form in which the notification is to be made. In the EU, the use of a form in accordance with the Commission Delegated Regulation (EU) 2016/532 is required.

The exact content of such a report would also have to be determined by the government. It is clear from the explanatory report that the transactions will have to be stated in full, with it being explicitly stated that the name and job title must also be published. This contrasts the existing regimes of the stock exchanges where such information must be provided to the stock exchange, but does not form part of the publicly disclosable information. In the EU, the name of the person, the reason for the report, the name of the relevant issuer, a description and identifier for the financial instrument, the type of transaction, the date and place of the transaction, and the price and volume of the transaction must be stated. We do not see any added value for the market in naming the person and would recommend removing this public disclosure item.

The persons covered include members of the board of directors and senior management of a company, as well as persons close to them. The group of persons

subject to reporting requirements under Swiss law would therefore be less extensive than under EU law. Under EU law, all persons who perform management tasks are subject to reporting requirements. Such persons do not necessarily have to be members of the management; it is sufficient if they make decisions that influence the future development of the company. However, we welcome the proposed restriction to formal members of the board of directors and the C-level management.

EU legislation stipulates that issuers must inform their managers in writing of their reporting obligation. It is also required that the issuer creates a list of the managers and close persons. Furthermore, persons discharging executive responsibilities must also inform those closely associated with them in writing of their reporting obligation and keep a copy of such notification (art. 19 para. 5 MAR). Whether such a formal rule would also be implemented under Swiss law remains to be determined by the government if the proposed changes pass parliament.

EU law requires that persons who carry out management responsibilities and who perform a relevant transaction of their own account must report this to the issuer without delay and at the latest three business days after the date of the transaction (art. 19 para. 1 MAR). The issuer, in turn, must ensure that the information reported in accordance with art. 19 para. 1 MAR is made public without delay and no later than three business days after the transaction (art. 19 para. 3 MAR).

Pursuant to art. 37c para. 1 Draft-FMIA, the members of the board of directors and the senior management, as well as persons closely associated with these members, must report relevant transactions to the company within two trading days. Art. 37c para. 2 Draft-FMIA then stipulates that the company must report the notification received within three trading days. The stock exchange must then publish the report "as soon as possible" and forward it to FINMA. These deadlines correspond to the current regulations of the Swiss stock exchanges and seem appropriate to us.

In addition, the government would be authorized under art. 37c para. 5 Draft-FMIA to mandate blackout periods for management transactions. The EU also has a corresponding regulation that provides for a period of 30 calendar days prior to the publication of an interim report or an annual report during which no more proprietary transactions may be carried out (art. 19 para. 11 MAR). Exceptions are possible (art. 19 para. 12 MAR). The establishment of blackout periods already corresponds to best practice in particular because these periods de facto have to be disclosed in a listed companies corporate governance report (de jure it is a comply or explain regime). To our knowledge, trading bans during these periods are generally observed and do not lead to difficulties in practice. In light of this, we generally oppose the legal codification of such blackout periods.

Art. 149a Draft-FMIA also provides for criminal liability under art. 37c Draft-FMIA for both intentional and negligent breaches, punishable by a fine of up to CHF 500,000

or 100,000 respectively. It follows from the explanatory report that both the failure by the individual to report and the failure by the company to publish will be punishable. The sanction is thus likely to be imposed on the company as well as on the members of the board of directors and the senior management who are subject to the reporting requirement, as well as on persons close to these members. In our opinion, this represents a questionable broadening of the penalization of individuals, particularly in view of the penalization of negligence, as well as the amount of the fine and the resulting entry in the criminal record.

Should the management transactions be transferred from the listing rules of the stock exchanges to the FMIA (which we question), we believe that the legal regulation should be limited to equity securities, as is the case in the current regimes of the Swiss stock exchanges.

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Proposed Amendments to the FMIA: Impact on Rules for Disclosure of Significant Shareholdings

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The Federal Council recently concluded a public consultation on proposed amendments to the Financial Market Infrastructure Act (FMIA). The proposal consists of a wide range of amendments and modernizations covering topics and rules on financial market infrastructures, takeover law, management transactions, ad hoc publicity, insider and derivatives trading. The proposed amendments also include amendments to the Swiss regime on disclosure of significant shareholdings. Specifically, in order to reduce the administrative burden, the notification duty should in the future only apply if the threshold of 5% is reached, exceeded or fallen below (as opposed to the current 3% initial threshold). In addition, the Federal Council stated a goal that in the future only serious breaches of the disclosure obligations should be prosecuted by means of criminal proceedings, thereby relieving institutional investors and individuals in minor cases. These changes are intended to make the Swiss financial market more competitive and at the same time more even-handed. The proposed amendments thus promise to make things noticeably easier for market participants, but are by no means thought through to the end. Rather, the proposed legislative changes in the revision should be taken as an opportunity to more comprehensively rethink key aspects of the Swiss regime on disclosure of significant shareholdings.

By Patrick Schärli / Patrick Schleiffer / Charlotte Arndgen

1) Proposed Changes

The Financial Market Infrastructure Act (FMIA), in force since 2016, regulates the organization and operation of financial market infrastructures as well as the conduct obligations of financial market participants in securities and derivatives trading. Introduced in response to the financial crisis in 2008, it aims to stabilize and make the Swiss financial market more competitive and to protect investors and ensure their equal treatment. An initial review of the law by the Federal Department of Finance (FDF) in 2022 showed that the FMIA has proven its worth, but requires adjustments due to technological and international developments (see *Änderungen des Finanzmarktinfrastrukturgesetzes, Erläuternder Bericht zur Eröffnung des Vernehmlassungsverfahrens des Eidgenössischen Finanzdepartements EFD vom 19. Juni 2024*, <https://www.newsd.admin.ch/newsd/message/attachments/88244.pdf> (2024 FMIA Explanatory Report), p. 2; *Evaluation des Finanzmarktinfrastrukturgesetzes – FinfraG-Review, Bericht des EFD vom 22. September 2022*, <https://www.newsd.admin.ch/newsd/message/attachments/73356.pdf>(2022 FMIA Review Report), p. 2).

The Federal Council's proposal for the amendments to the FMIA is intended to address the need for action identified during the review of the FMIA by the FDF. In addition to the proposed amendments to financial market infrastructures, takeover law, management transactions, ad hoc publicity, insider and derivatives trading, the following two proposed amendments to the rules on disclosure of significant shareholdings are of particular relevance:

- **Raising the thresholds for the notification duty**: The notification duty to disclose shareholdings in listed companies pursuant to article 120 et seqq. FMIA is proposed to be amended to the effect that the current lowest threshold of 3% will be raised to 5% of the voting rights. See section 2 below for further details.

- **Limitation of criminal liability to material breaches of the notification duty**: The possible breaches of the notification duty in article 151 FMIA are proposed to be specified by law in order to avoid minor violations to trigger criminal liability. The disclosure requirements of the stock exchanges are intended to give those responsible the opportunity to make corrections in the event of breaches of the notification duty so that only serious cases are prosecuted by way of criminal proceedings. See section 3 below for further details.

We take the view that the proposed changes should not be assessed in isolation, but rather, the Swiss regime on disclosure of significant shareholdings requires a comprehensive and critical analysis that reassesses such regime in light of current market developments and identified shortcomings in practice. Such holistic assessment can help to strengthen the effectiveness and coherence of disclosure law and to ensure that it meets the requirements of a changing financial market.

2) Proposed Changes to the Duty to Disclose Significant Shareholdings

The current rules around the disclosure of significant shareholdings (article 120 et seqq. FMIA) lead to a relatively high number of disclosure notices compared to international standards, which causes considerable effort for investors, the listed companies and stock exchanges. The large number of disclosure reports also makes it difficult for market participants to identify really relevant information, which jeopardizes the desired transparency purpose of the disclosure rules (see 2022 FMIA Review Report, p. 22).

The Federal Council proposes to remedy the existing shortcomings of the Swiss disclosure regime by amending article 120 (1) FMIA. By abolishing the lowest reporting threshold of 3%, the minimum threshold for disclosing shareholdings in listed companies is raised to 5%.

The abolition of the 3% reporting threshold in article 120 (1) FMIA is, *inter alia*, welcomed for the following reasons:

– It is in line with **international standards** and the practice of many countries, including the majority of the EU member states, the USA, Hong Kong and Singapore, which likewise only require notification once 5% of the voting rights have been acquired;

– It is better aligned with **Swiss company law** and contributes to a more uniform regulation. A threshold of 5% of the shares or votes is relevant for various important shareholder rights under the Code of Obligations (CO) which governs Swiss corporations. For example, it entitles shareholders to exercise their right to inspect company files (article 697a (1) CO), to request a special investigation in the case of listed companies (article 697d (1) (i) CO), and to convene a general meeting of a listed company (article 699 (3) (i) CO);

– It continues to promote **market transparency** and **contributes to a simplification of the notification duty**; and

– It offers **advantages for investors, listed companies and the capital market as a whole** by reducing the administrative burden and increasing efficiency.

Having said the above, in connection with the proposed amendments to the FMIA, we also consider it a good opportunity to review and amend certain other disclosure related rules and propose changes at the level of the FMIA. Specifically, the following reporting rules should be reviewed and amended:

a) Amendment of Reporting Rules on Positions held by Collective Investment Schemes

The disclosure rules related to the reporting of positions held by collective investment schemes should be reviewed and clarified at the level of the FMIA (as opposed to only at the level of the implementing ordinance, i.e., the Financial Market Infrastructure Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) (FMIO-FINMA)). This is particularly necessary given that the current reporting regime (see the rules in article 18 FMIO-FINMA) creates legal uncertainties and are not straightforward to apply in practice.

Article 120 FMIA provides for two notification duties: that of the beneficial owner (Article 120 (1) FMIA) and that of the third party who has the discretionary power to exercise the voting rights (article 120 (3) FMIA). The beneficial owner is defined in article 10 (1) FMIO-FINMA as the party controlling the voting rights stemming from a shareholding and bearing the associated risk, which is often a natural person.

Under the FMIO-FINMA, if collective investments schemes are not approved for being offered to the public in Switzerland, they are treated in the vast majority of cases in accordance with article 18 (4) FMIO-FINMA. This means that positions must be reported at the level of the beneficial owner in accordance with article 120 (1) FMIA, which assimilates the sponsor of the collective investment with the beneficial owners. However, this assimilation does not reflect the economic reality, as the sponsors of collective investments typically do not bear the economic risk. This lies exclusively with the beneficial owners, i.e., the investors in the relevant collective investment scheme.

The provision in article 18 (4) FMIO-FINMA also leads to rather absurd results, such as the reporting of fund positions at the level of natural persons who, however, do not bear this risk (and regularly do not even know about it). Incorrect reports then – unfairly – also lead to criminal investigations against these persons (see also section 3 below for more details). The most important player with regard to the disclosure of shareholdings is the manager of the collective investment scheme, who decides on the transactions carried out by the fund and its influence on the companies invested.

In order to rectify the current legal situation, it is sufficient to expressly stipulate that positions held by or on behalf of collective investment schemes must be reported in accordance with article 120 (3) FMIA (and not article 120 (1) FMIA). In order to prevent circumvention of article 120 (1) FMIA, corresponding principles could be included in the ordinance.

b) Review of, and Amendment to, the FMIO-FINMA

Furthermore, the revision of article 120 FMIA – once passed by Parliament – should be used as an opportunity to review and amend certain of the disclosure-related provisions in the FMIO-FINMA. For example, it would be worth considering to adjust

the rules regarding the calculation basis for disclosure notifications in connection with forthcoming capital increases (i.e. post capital increase share numbers as basis) in order to avoid difficult to understand or even confusing disclosure reports (e.g. by commitment providers in the context of capital increases).

We would also suggest to reflect the well-established practice of the disclosure office regarding disclosure in connection with lock-ups, underwritings, sub-underwritings and backstop commitments and similar circumstances, for which the disclosure office regularly grants exemptions or simplifications, in the implementing ordinance itself, and thereby reducing the administrative burden for market participants. Reflecting such practice in the FMIO-FINMA itself could prevent unnecessary expense – on all sides – that arises from the fact that a specific application must always be submitted to the disclosure office for these matters. Although these applications and recommendations are now largely standardized, their administrative burden remains. It is precisely because of their standardization that the relevant matters are suitable for regulation at ordinance level.

3) Limitation of Criminal Liability to Material Breaches of the Notification Duty

In practice, the high complexity of the disclosure rules regularly leads to legal uncertainties and minor, negligent breaches of the notification duty, all of which are subject to criminal liability (see article 151 FMIA). This means that violations must be reported by the disclosure offices to FINMA, which must file a complaint and then be assessed by the FDF. This effort appears disproportionate and resource-intensive in view of the often very minor and negligent infractions (see 2024 FMIA Explanatory Report, p. 18; 2022 FMIA Review Report, p. 22).

The proposed amendments in this context aim to improve the current legal situation by limiting criminal liability to material breaches of the notification duty in article 151 FMIA. By doing so, the aim is to prevent all breaches of certain ancillary provisions of the FMIO-FINMA from being subject to criminal liability. Only breaches of the main disclosure related rules (article 10-19 and 24 FMIO-FINMA) would remain subject to criminal liability, while breaches of article 22 and 23 FMIO-FINMA would no longer be prosecuted in most cases (see 2024 FMIA Explanatory Report, p. 50).

While the proposed limitation of criminal liability for breaches of the notification duty to cases that are not trivial is welcomed in principle, the proposed revision of article 151 FMIA is not entirely convincing. Pursuant to article 151 FMIA, anyone who intentionally violates a reporting obligation is liable to a fine of up to CHF 10 million; in the case of negligence, the fine is up to CHF 100,000. Not only are these fines very high (in comparison to their minor nature), they also lead to drastic consequences (especially in comparison to other jurisdictions that "only" provide for administrative sanctions) due

to the sanction proceedings qualifying as criminal proceedings in Switzerland. There is a general agreement that the criminal liability under article 151 FMIA is appropriate in cases of intentional non-disclosure, late disclosure or concealment of reportable content and that such conduct should be sanctioned accordingly. In other cases, however, even the proposed amendment to the provision in article 151 FMIA proves to be disproportionately strict:

- **Criminal liability of institutional investors**: In addition to Swiss disclosure obligations, institutional investors are obliged to comply with corresponding disclosure and notification duties in all the jurisdictions in which they invest. In order to meet this complex requirement, the respective institutional investors have complex systems and specialized staff in place to ensure that the notification duties in the various jurisdictions are met in a timely and formally correct manner. Despite these considerable organizational precautions, there may still be delays or inaccuracies in disclosure reporting which would be subject to criminal liability according to article 151 FMIA. In such cases, i.e. where an investor has put in place appropriate systems and processes designed to ensure compliance with reporting obligations, it does not seem proportionate to apply the same criminal law instruments – in particular article 151 FMIA and the associated administrative criminal proceedings – as in the case of clear breaches of negligence.

- **Criminal liability of individuals**: Irrespective of the size of institutional investors and their complex structure, the notification duty often lies with a single natural person which may often be the chairman of the board or the CEO (as is also the case with article 18 (4) FMIO-FINMA as explained in section 2). This shifts liability to the level of an individual, who typically does not bear the economic risk and often neither knows nor can know of the notification duty. The criminal provision in article 151 FMIA and the associated administrative criminal proceedings in Switzerland entail disproportionate consequences for such persons, which appear excessive compared to international standards.

In these circumstances, the question arises as to whether delays in reporting – despite appropriate organizational precautions – are actually "negligent" within the meaning of article 150 (2) FMIA. The assumption that every delayed disclosure report is automatically due to negligence does not always correspond to the actual circumstances. Hence, we propose to specify in article 151 FMIA that, in the absence of intent, the offense is only fulfilled if the person concerned has not taken the measures appropriate in the circumstances to comply with article 120 FMIA. In addition, we propose to fundamentally reconsider whether it is always proportionate to hold individuals liable for breaches of the reporting obligation.

The proposed amendment to article 151 (1) (a) (i) FMIA clarifies that an incorrect report is considered "non-disclosure" and is therefore punishable by law (see 2024 FMIA Explanatory Report, p. 50). However, no further details are given as to what exactly is considered "non-disclosure". In our view, minor errors should not be considered as "non-disclosure" and therefore should not be sanctioned. A corresponding clarification in the upcoming Federal Council Dispatch would be desirable.

In this proposal to amend the FMIA, criminal law (as in article 147 et seqq. FMIA) is used to an exaggerated extent as an enforcement instrument. This should be critically questioned, as criminal law should primarily serve to protect the highest legal interests. The current criminal provision in article 151 FMIA is not very appropriate from a practical point of view and leads to disproportionate and sometimes unfair consequences.

4) Conclusion

The proposed amendments to the Swiss regime on disclosure of significant shareholdings aim to reduce the administrative burden for investors, the listed companies and the stock exchanges by increasing the current 3% initial threshold to 5% and by limiting the criminal liability to material breaches of the notification duty. Irrespective of these proposed changes, the current situation in disclosure law and the upcoming revision of the FMIA should be used as an opportunity to review the existing weaknesses and practical challenges of the Swiss disclosure framework in general and make fundamental improvements (also later at the level of the implementing ordinance, the FMIO-FINMA). A revision of the notification duties for shareholding in collective investment schemes, a more differentiated approach for criminal liability (also in light of rules in other international financial markets) as well as a general overhaul of the FMIO-FINMA appear particularly important.

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Observations on the Current System of Major Shareholder Disclosure in Switzerland and its Planned Expansion

Reference: CapLaw-2024-83

The Swiss system for major shareholder disclosures requires investors to report holdings crossing thresholds (e.g., 3%, 5%, 10%) within four trading days. While these disclosures can significantly impact stock prices, the system is complex and prone to errors, partly due to intricate rules and limited guidance from disclosure offices. Violations are treated as misdemeanors, punishable by fines of up to CHF 10 million, though settlements

are common to avoid criminal records. However, the system struggles to improve compliance, with around 5% of reports leading to complaints annually. Key issues include excessive fine ranges, a lack of preventive effects, and limited due process for accused parties. Proposed solutions include simplifying rules, reducing fine limits, and reclassifying violations as mere administrative offenses. Additionally, plans to extend this system to ad hoc and management reporting face criticism for replicating current inefficiencies.

By Matthias Courvoisier / Yves Mauchle

1) How the Current System Works

Major shareholder disclosures for public companies are known to have statistically significant impacts on share prices. Even in jurisdictions where investors are not required to disclose their intentions (unlike in the U.S.), announcements often result in price changes. Positive impacts are generally associated with institutional investors, activists, or strategic partners, especially for larger stakes. Conversely, passive investors or those lacking a strong reputation can lead to neutral or even negative market reactions.

Disclosure thresholds in Switzerland are set at 3%, 5%, 10%, 15%, 20%, 25%, 33 1/3%, 50%, and 66 2/3%. When these thresholds are reached or crossed, disclosures must be made to both the stock exchange where the company is listed and the company itself within four trading days.

Switzerland's disclosure framework is complex and to a certain extent unique. For example:

1. Thresholds are measured against entries in the commercial register, which can be difficult for foreign investors to access and permanently supervise.

2. Rules for collective investment schemes differ based on whether they are admitted in Switzerland.

3. There are specific requirements for disclosure of delegated discretionary voting rights.

These complexities make disclosure compliance a specialized field of law handled by a small number of experts.

In recent years, the disclosure offices of Swiss stock exchanges have become less accessible for informal consultations, operating instead in a mechanistic, formal manner. This change, reportedly due to accusations of investors relying on informal guidance to defend violations, has increased the risk of reporting errors, potentially undermining market transparency.

2) Handling Violations

If a potential violation is identified, the disclosure office reports it to FINMA. If FINMA finds merit in the claim, it refers the case to the Federal Department of Finance (FDF). Below are annual statistics of disclosure reports and complaints filed:

Year	*Reports*	*Complaints*	*Complaint Rate (%)*
2014	1,371	46	3.4%
2015	1,267	41	3.2%
2016	1,587	83	5.2%
2017	1,855	33	1.8%
2018	1,906	156	8.2%
2019	1,465	110	7.5%
2020	2,117	45	2.1%
2021	1,546	63	4.1%
2022	1,652	79	4.8%
2023	1,440	71	4.9%

Violations of disclosure rules are punishable by fines of up to CHF 10 million for intentional violations and CHF 100,000 for negligent violations. However, negligent violations are rare, as misunderstanding the legal requirements does not qualify as negligence under Swiss law and the facts are most often known to those possibly violating the rules.

The FDF has power for both investigations and decisions, with accused parties able to request court review. Settlements are common, allowing investors to avoid criminal records or further proceedings, while also easing the workload of authorities.

3) Problems with the Current System

1. Lack of Preventive Effect:

Despite penalties and settlements, around 5% of reports result in FDF complaints annually, suggesting that fines fail to improve compliance or enhance market transparency.

2. Excessive Fine Range:

The maximum fine of CHF 10 million is rarely applied, as such severe penalties are intended for cases akin to market fraud, not minor reporting errors.

3. Vulnerable Defendants:

Both private individuals and companies often lack the possibility to defend themselves effectively. The reason is that they can hardly afford to be sentenced to a criminal fine because of their exposure to supervisory authorities in their home country or because

they depend on clean criminal records. As a result, they need to settle with FDF. This undermines due process.

4) Proposed Solution

1. Separate Provisions for Market Fraud:
Introduce a dedicated legal framework for market fraud, categorizing it as a criminal offense (*Vergehen*) akin to insider trading, with specific requirements like market deception for financial gain. The market manipulation rule goes into that direction, but needs better tailoring.

2. Shift to Administrative Fines:
Reclassify violations as administrative offenses, with penalties that do not result in criminal records. This aligns with the German Administrative Offenses Act (*Ordnungswidrigkeitengesetz*). This would improve the situation of accused substantially and would remove the criminal aspect from the violation which is more appropriate given that it is a mere violation of an information duty.

3. Streamlined Processes:
Implement faster procedures for these minor violations, akin to issuing speeding tickets, reducing complexity and delays.

4. Reduced Fine Limits:
Cap fines at CHF 50,000 or less per violation, reflecting typical settlement amounts and focusing criminal punishment on serious cases of market fraud.

5. Simplify Disclosure Rules:
Clarify and streamline the rules to make compliance more straightforward, reducing the risk of unintentional violations.

5) Planned Expansion to Other Reporting Obligations

The Swiss government plans to extend the current system to cover violations of ad hoc reporting rules and management transaction reporting rules. However, this approach risks replicating flaws in the current framework. Before expanding the system, reforms should address the inefficiencies and weaknesses in its application to shareholder disclosures. Moreover, one should consider not to address ad hoc reporting and management transaction reporting in state rules. The current rules of the stock exchanges are fully fit for purpose and do not require a state regulation.

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Proposed New Information Duties – Need for Limits

Reference: CapLaw-2024-84

The draft changes proposed in the consultation on the amendment to the Financial Market Infrastructure Act seek to introduce wide-ranging information duties towards the Disclosure Office or FINMA. The nemo tenetur principle and other basic principles of the rule of law, however, warrant specific limits.

By Benjamin Leisinger / Reto Ferrari-Visca

The draft legislation proposed by the Swiss Federal Council to amend the Financial Market Infrastructure Act (FMIA) includes several provisions, *i.e.*, articles 39(7), 124b, 145 and 146 of the draft FMIA, that seek to introduce wide-ranging information duties towards the relevant Disclosure Office or the Swiss Financial Market Supervisory Authority FINMA (FINMA), respectively.

Article 39(7) of the draft revised FMIA would introduce a general duty for all participants admitted to a trading venue to provide FINMA with all the information and documents it requires to perform its duties. While this duty already applies – via article 29 of the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA) – to Swiss supervised entities, as the Explanatory Report on the Opening of the Consultation Procedure (Explanatory Report) correctly states, the new duty would apply to all participants of trading venues, irrespective of whether they are subject to supervision by FINMA.

Article 124b of the draft would introduce an explicit duty for individuals and companies subject to the disclosure and reporting obligations under the FMIA to provide the necessary information and documents to the relevant Disclosure Office. According to the Explanatory Report, such a right to information on the part of the Disclosure Offices is necessary so that they can actually assess whether a breach of the reporting obligation has occurred and thus be able to comply with their supervisory obligations regarding the correct fulfillment of the reporting obligation in accordance with article 124a. The Disclosure Offices are not required to conduct any actual investigations beyond the collection and evaluation of information as such investigations are reserved for FINMA as the competent supervisory authority. In other words, the Disclosure Offices only require the information and documents that are necessary to ensure that all disclosure obligations are fulfilled and that transparency within the financial market is maintained.

Similarly, the new draft article 145 FMIA states that, amongst others, the supervisory instruments in accordance with article 29(1) FINMASA apply to all persons who violate certain articles of the revised FMIA (including the disclosure obligation in article 120

FMIA). Article 29 FINMASA is the legal basis for the duty to provide FINMA with all information and documents that it requires to carry out its tasks.

Furthermore, article 146 of the draft legislation intends to introduce an information duty. According to the draft legislation, the admission, disclosure and monitoring bodies of the trading venues and DLT trading systems as well as issuers and their agents would have to provide FINMA all information and documents that it requires to fulfill its duties.

All of the proposed statutory rules to provide information have a common and significant defect: they can come into conflict with the fundamental principle that no one is obliged to incriminate themselves (so-called prohibition of self-incrimination or *nemo tenetur se ipsum accusare* principle). While wide-ranging information duties towards the Disclosure Offices and FINMA may arguably be in the public interest, in particular to ensure the proper functioning and transparency of the financial markets, and thus in general justified, they cannot override the *nemo tenetur se ipsum accusare* principle. This principle is guaranteed by both article 32 of the Federal Constitution of the Swiss Confederation and by international law (specifically, by article 6 of the European Convention on Human Rights and article 14(3)g of the International Covenant on Civil and Political Rights) and applies to individuals and legal entities alike. Therefore, in the authors' view, this conflict must be resolved by establishing an explicit statutory right of refusal, particularly given that the new information obligations are to apply to all participants of trading venues and/or to issuers and their agents. Relevant existing procedural regulations, for example, do provide for corresponding explicit rights of refusal (*e.g.* article 42 Federal Act on Federal Civil Procedure; article 16 Federal Act on Administrative Procedure; article 169 Swiss Criminal Procedure Code; article 163 Swiss Civil Procedure Code). The right of refusal must also extend to the case of possible danger to close persons. In this context, such persons must include, in particular, persons for whom the person or company obliged to provide information or a group company has a duty of care (such as employees and members of the board of directors). It is essential that the final draft of the legislation provides clarity on this matter to avoid any ambiguity or uncertainty. In line with fundamental legal principles on the rule of law, the final legislation should also clearly state that matters and documents that are subject to attorney-client privilege are not covered by the duty to provide information, also not where attorneys act as an agent of an issuer.

At the very least, a rule should be introduced that any information provided to the Disclosure Office or FINMA, as applicable, cannot be used in related proceedings that could lead to criminal or administrative sanctions. The European Court of Human Rights, for example, has on various occasions qualified the use of information obtained in administrative proceedings on the basis of a duty to provide information as

inadmissible in criminal proceedings and thus ultimately established a ban on the use of such evidence.

The legislator should take note of the existing critical views voiced in connection with article 29 FINMASA and should carefully consider whether the same obligations should be introduced for all market participants in connection with regulations on market abuse and/or the notification of significant shareholdings.

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M&A Transactions in the Swiss Financial Market – Part I: Acquiring a Qualified Participation in a Swiss Regulated Entity

Reference: CapLaw-2024-85

The Swiss financial market laws provide for a number of regulatory notification and approval requirements which must be adhered to in the context of M&A deals involving entities prudentially supervised by FINMA. This article provides an overview of the relevant regulatory requirements applicable to an acquisition of a qualified participation in a Swiss regulated financial institution.

By Alexander Wherlock

1) Introduction

In the past two years the number of M&A deals in the Swiss financial market has vastly increased. There has been M&A activity in the public markets, such as most notably the recent merger of UBS and Credit Suisse as well as the well-publicized public take-over battle between Liontrust Asset Management plc and the investor group NewGAMe regarding the listed Swiss fund manager, GAM Holding AG, which ultimately led to NewGAMe acquiring a 27% stake in the company. There has, however, also been a number of transactions in the private M&A market, such as the acquisition of Kaleido Privatbank AG by Bank Richelieu or the acquisition of Sociéte Génerale Private Banking (Suisse) SA by Union Bancaire Privée.

As with any M&A deal, transactions involving regulated Swiss financial institutions will pose a number of legal, tax and structuring issues which need to be adequately reflected in the relevant transaction documentation. In addition, the Swiss financial market laws provide for a number of regulatory notification and approval requirements which need to be adhered to in the context of M&A deals relating to entities prudentially supervised by

the Swiss Financial Market Supervisory Authority FINMA (FINMA). This article provides an overview of the relevant regulatory requirements which must be complied with when acquiring a qualified participation in Swiss regulated financial institutions under a share deal. Asset deals under which a portfolio of assets is acquired by and/or from a Swiss regulated entity may be subject to different regulatory requirements under the Swiss supervisory framework. Whilst not covered in this article, the author will be providing an overview of the regulatory requirements to be observed in the context of an asset deal involving Swiss regulated entities in "M&A Transactions in the Swiss Financial Market – Part II: Asset Deals Involving Regulated Entities" which will be published in the next edition, CapLaw 1/2025.

The considerations outlined herein focus on the regulatory requirements applicable to banks regulated under the Federal Act on Banks and Savings Institutions (Banking Act). However, where appropriate, reference is made to the relevant requirements applicable to other financial institutions, i.e. securities houses, fund management companies, asset managers for collective assets, trustees and asset managers within the meaning of the Federal Act on Financial Institutions (Financial Institutions).

2) Acquisition of a Qualified Participation in a Swiss Regulated Entity

a) Regulatory Framework – Overview

Article 3 of the Banking Act sets out the licensing requirements applicable to Swiss banks. Pursuant to article 3(2) Banking Act, any person who directly or indirectly holds at least 10% of the equity capital or voting rights in a Swiss bank, or who can significantly influence such bank's business activity in another manner (Qualified Participation) must ensure that their influence is not detrimental to the prudent and sound business activity of the respective bank (*Gewähr für eine einwandfreie Geschäftstätigkeit*).

Article 3(5) Banking Act provides for a corresponding notification requirement in case of a sale and/or acquisition of a Qualified Participation in a Swiss bank. Thereunder, each person must notify the FINMA before directly or indirectly acquiring or disposing of a Qualified Participation in a Swiss bank. This notification requirement also applies if a Qualified Participation is increased or reduced in such a way as to reach, exceed or fall below the thresholds of 20%, 33% or 50% of the equity capital or voting rights in a Swiss bank.

As a consequence, any M&A transaction resulting in (i) the acquisition or a disposal of a Qualified Participation in a Swiss bank or (ii) an increase and/or decrease of a holding in a Swiss bank above or below the relevant thresholds referred to above, will trigger a notification requirement under article 3(5) of the Banking Act. The notification requirement applies both to the selling and the acquiring party in a respective transaction. Therefore, from a regulatory perspective a separate notification must be

submitted to FINMA by each party. In addition, pursuant to article 3(6) Banking Act, the bank itself must notify FINMA of the transaction and the change in the holders of a Qualified Participation.

Article 11(5) of the Swiss Financial Institutions Act (FinIA) provides for a corresponding notification requirement in case of transactions relating to Qualified Participations in Financial Institutions (other than asset managers and trustees, see below at 2) f)).

b) Covered Transactions

Whilst in certain constellations it may be evident that the notification requirement applies, such as in case of an acquisition of all shares or the majority of all shares in a Swiss bank, other constellations may not be quite as clear leading to uncertainties as to the applicability and the scope of the notification requirement pursuant to article 3(5) of the Banking Act:

– **Acquistion of an Indirect Qualified Participation**: From a regulatory perspective, the notification requirement applies to both direct and indirect acquisitions of a Qualified Participation in a Swiss bank. As a consequence, the transaction parties may be subject to the relevant notification requirement in constellations in which the target itself is not a Swiss regulated entity, the target, however, holds a direct and/or indirect Qualified Participation in a Swiss bank within the relevant group structure. As a consequence, from a Swiss regulatory perspective, the notification requirement under article 3(5) and (6) Banking Act will also apply in case of an acquisition of an unregulated parent entity holding a (direct or indirect) Qualified Participation in a Swiss bank.

  In particular, in the context of group structures, it should also be noted that pursuant to FINMA's practice when determining whether a particular shareholding qualifies as a Qualified Participation, within a multi-level shareholding structure, the participations are not multiplied. This practice (which in the author's view is not necessarily consistent with the reasoning underlying the notification duties in the Banking Act) intends to prevent a person from artificially establishing a multilevel shareholding structure in relation to a Swiss bank in which numerous majority participations are layered on top of each other, which would permit such person to control the Swiss bank, whereas if the various participations were multiplied the relevant indirect participation would be below 10%. This means that in a group constellation any entity holding a 10% participation in an entity which itself holds a direct and/or indirect Qualified Participation in a Swiss bank, is deemed to qualify as a (indirect) qualified participant within the meaning of article 3(2) of the Banking Act. This practice of FINMA can, in particular, in the context of multilevel holding structures, lead to overly burdensome notification requirements for a large number of qualified participants which in practice have a neglectable influence on the Swiss bank.

– **Corporate Reorganizations**: The notification requirement under article 3(5) and (6) Banking Act also applies to internal corporate reorganizations, to the extent that the transaction leads to a change in the shareholding structure in the Swiss bank, irrespective of whether a third-party entity is involved. Under article 3(5) and (6) Banking Act, even the transfer of a direct or indirect Qualified Participation in the Swiss bank will trigger the notification requirement. Depending on the respective thresholds which are affected by the reorganization, even the mere re-balancing of shareholdings within a financial group that holds a Qualified Participation in the Swiss bank, may lead to a regulatory notification requirement under article 3(5) and (6) Banking Act, to the extent that the transaction leads to a relevant change of the shareholdings previously notified to FINMA.

– **Other Forms of Control**: Pursuant to the Banking Act, a Qualified Participation may result from a direct and/or indirect holding of at least 10% of the equity capital or voting rights in a Swiss bank, or from other arrangements permitting a person to significantly influence such bank's business activity in another manner. Neither the Banking Act nor the pertaining Ordinance on Banks and Savings Institutions (Banking Ordinance) clarify which other constellations may lead to a person significantly influencing such banks business activity in another manner. However, in practice significant financing arrangements, potentially combined with wide-ranging collateral agreements, leading to a dependency on the financing party by the Swiss bank or other contractual arrangements, such as shareholder agreements or joint ventures which permit a person or a group of persons acting in concert to exert influence on the Swiss bank may also qualify as a Qualified Participation and ultimately lead to a notification requirement under article 3(5) and (6) Banking Act. As a consequence, even in transactions that do not qualify as typical M&A deals but permit a party to exert significant influence on the business of a Swiss bank, an assessment will be required whether the notification requirement under article 3(5) and (6) Banking Act applies.

The considerations outlined above apply *mutatis mutandis* to Financial Institutions under the FinIA.

c) Notification of FINMA – Formalities

As outlined above, in case of a disposal over a Qualified Participation in a Swiss bank, a separate notification requirement will apply to the acquiring entity, the selling entity and the bank itself. The notification by the selling entity and the bank (including an update of the FINMA Form A1 and A2 – Declaration regarding the Holders of Qualified Participations) are somewhat straight forward and can from a regulatory perspective be limited to informing FINMA of the intended transaction.

In contrast, as the notification and the documentation to be submitted to FINMA by the acquiring entity will form the basis of FINMA's regulatory fit-and-proper test, the

buy-side notification is more extensive. Pursuant to article 8 of the Banking Ordinance, an entity acquiring a Qualified Participation in a Swiss Bank must submit the following documentation to FINMA (Fit-and-Proper Documentation):

(a) Articles of Association;

(b) Excerpt from the Commercial Register (or foreign equivalent);

(c) Description of the business activities, financial status and group structure chart;

(d) Information regarding pending and past civil, criminal and/or administrative proceedings (FINMA Form B1 – Declaration regarding Pending and Past Proceedings);

(e) Information regarding other participations in the financial sector (FINMA Form B2 – Declaration regarding Qualified Participations);

(f) Declaration on whether the qualified participation is held on behalf of a third party or on its own behalf (FINMA Form A3 – Declaration of Direct Qualified Participants or FINMA Form A4 – Declaration of Indirect Qualified Participants, as applicable); and

(g) natural persons holding a Qualified Participation in a Swiss bank must additionally submit information regarding their nationality and domicile and an excerpt from the debt enforcement register and a criminal record (instead of articles of association and a commercial register excerpt as required for legal entities).

The Fit-and-Proper Documentation to be submitted to FINMA is fairly extensive and the compilation thereof can – in particular in complex holding structures – be time consuming and burdensome considering that the relevant documents must be submitted by each person or entity holding a direct or indirect Qualified Participation in a Swiss bank.

Finally, whilst article 3(5) and (6) Banking Act from a legal perspective stipulate separate notification requirements for the selling entity, acquiring entity and the bank, in recent cases FINMA has requested that all notifications and the Fit-and-Proper-Documentation are submitted by the bank via FINMA's EHP-Platform. In particular, in unfriendly take-over proceedings or in cases of rival bids, this can from an operational perspective be challenging. In order to facilitate the cooperation with FINMA, it is in practice advisable to accommodate this collaborative approach. However, despite FINMA's practice, any notification and Fit-and-Proper Documentation submitted to FINMA in another permissible manner, *i.e.* by serving the documents to FINMA by post, must be considered validly submitted from a legal perspective.

The considerations outlined above apply *mutatis mutandis* to Financial Institutions.

d) Fit-and-Proper Test by FINMA

Based on the Fit-and-Proper Documentation, FINMA will, in relation to each new qualified participant on the buy-side of a transaction conduct the regulatory fit-and-proper test (the Fit-and-Proper-Test) and assess whether the influence potentially exerted by the person or entity directly or indirectly acquiring a Qualified Participation may be detrimental to the prudent and sound business activity of the respective Swiss bank.

The standard FINMA applies under the Fit-and-Proper-Test in relation to a qualified participant is not as strict as under the corresponding test applied in relation members of the board of directors and/or the executive committee of Swiss banks under article 3(2)(b) Banking Act. Neither the Banking Act nor the Banking Ordinance define clear criteria for the Fit-and-Proper Test, generally, however, the Fit-and-Proper Test will not be met in the following cases:

- Sanctions against the entity/person acquiring a Qualified Participation;

- Criminal conviction of the respective entity/person which disqualify such person and/or entity from holding a Qualified Participation in a Swiss bank, such as money-laundering, tax evasion, forgery, fraud and/or embezzlement (conversely convictions with no link to the relevant business activities of a bank, such as traffic related convictions, should not negatively impact the Fit-and-Proper Test); and

- Exploiting the dependency of the Swiss bank for personal gains.

From a formal perspective, article 3(5) and (6) Banking Act stipulate a notification requirement. In practice, however, FINMA under the regulatory Fit-and-Proper Test has a *de-facto* approval authority. In principle, upon submitting the relevant notifications to FINMA, the transaction parties will from a formal perspective have satisfied their regulatory duties under article 3(5) and (6) Banking Act, and could proceed to the closing of the transactions ultimately leading to the acquisition of the Qualified Participation. However, under its general regulatory powers, FINMA could, to the extent it concludes that the acquiring party does not satisfy the regulatory Fit-and-Proper Test, implement various regulatory measures ranging from a suspension of the voting rights attached to the Qualified Participation to ordering the acquiring entity to sell the Qualified Participation to a third party. Due to the invasive nature of such measures, in practice, it should be ensured that formal FINMA approval or a no-objection statement can be obtained prior to closing to ensure legal certainty under the transaction. As a consequence, share purchase agreements relating to a regulated Swiss bank typically include a closing condition that FINMA has not objected to the transaction. In view of this *de-facto* approval requirement and in consideration of a bank's general information duties under article 29(2) of the Financial Market Supervisory Act it is generally

advisable to informally reach out to FINMA at an early stage of a transaction to ensure an efficient handling of the approval process. This may also allow informal discussions with FINMA as to the expected timing and the form of FINMA's approval and/or no objection decision.

The considerations outlined above apply *mutatis mutandis* to Financial Institutions under FinIA.

e) Asset Managers and Trustees – in particular

As outlined above, the notification requirements relating to the acquisition of a Qualified Participation also apply to Financial Institutions, such as securities houses and fund management companies. Trustees and asset managers must provide the Fit-and-Proper Documentation for each person holding a Qualified Participation to FINMA in the context of the initial licensing procedure. However, pursuant to article 11(7) FinIA, the notification requirement pursuant to article 11(5) and 11(6) in case of a change to the holders of a Qualified Participation does not formally apply to asset managers and trustees within the meaning of FinIA.

Article 8 FinIA sets out a notification requirement applicable to all Financial Institutions, including asset managers and trustees, under which FINMA must be notified of any change in the facts underlying its regulatory license. Pursuant to article 10(d) and (e) of the implementing Financial Institutions Ordinance (FinIO), facts that may lead to the conclusion that a holder of a Qualified Participation no longer satisfies the Fit-and-Proper Test, are considered substantial changes of the facts underlying the regulatory license within the meaning of article 8(2) FinIA and as a consequence must be notified to and approved by FINMA. In contrast, neither article 8 FinIA nor article 10 FinIO reference *changes* to the qualified participants as changes which must be notified to FINMA. However, pursuant to FINMA's regulatory practice published on it's website (see; https://www.finma.ch/en/authorisation/portfolio-managers-and-trustees/aenderungen/), a change in the Qualified Participations in a trustee and/or asset manager is considered to be a relevant change covered by the notification and approval requirement under article 8 FinIA. In effect, despite not being specifically provided for under the FinIA and FinIO, trustees and asset managers are pursuant to FINMA practice also required to notify FINMA of any changes relating to its qualified participants (which in the author's view is not necessarily consistent with the reasoning underlying article 8 FinIA).

3) Additional Regulatory Considerations

Whilst the acquisition of a Qualified Participation in a Swiss bank will trigger a notification requirement under the Banking Act, depending on the transaction structure

additional regulatory requirements may also have to be adhered to in the context of M&A transactions involving Swiss banks and Financial Institutions.

(a) **Additional License as a Bank Subject to Foreign Control**: Pursuant to article 3bis Banking Act, a Swiss bank which is subject to foreign control requires an additional license as a bank subject to foreign control. A bank is considered to be subject to foreign control if a person and/or entity domiciled or incorporated outside of Switzerland can directly and/or indirectly exercise the majority of the voting rights in the Swiss bank and/or can exert a controlling influence over the Swiss bank in another manner. As a consequence, to the extent an entity and/or person domiciled outside of Switzerland acquires a majority stake in a Swiss bank, in addition to completing the Fit- and Proper-Test outlined above, the Swiss bank itself must obtain an additional license pursuant to article 3bis of the Banking Act, prior to the completion of the transaction.

As a so called "police license" (*Polizeibewilligung*), FINMA must grant the additional license pursuant to article 3bis Banking Act if the following licensing requirements are satisfied:

- The home jurisdiction of the acquiring entity grants reciprocity to FINMA which is generally the case for all jurisdictions that are party to the General Agreement on Trade in Services (GATS) of the World Trade Organization;
- The corporate name of the bank does not imply a Swiss character. In practice, this is ensured by adding the term "(Switzerland)" to the corporate name of the bank subject to foreign control; and
- To the extent that upon such acquisition, the Swiss bank becomes subject to the consolidated supervision of a foreign supervisory authority, the competent foreign authority must approve the acquisition of the majority stake in the Swiss bank.

Pursuant to article 43 FinIA, the same applies to securities houses subject to foreign control (but not to other Financial Institutions).

(b) **Implications on Consolidated Supervision**: Pursuant to article 3d Banking Act, FINMA can subject a financial group to its consolidated supervision and define specific regulatory requirements applicable to the financial group on a consolidated level. The scope of the consolidated supervision and the consolidated regulatory requirements are defined by FINMA in a consolidation decree and as such, the relevant requirements are typically tailored to the respective financial group.

The sale or the acquisition of a Qualified Participation in a Swiss bank may have implications on the consolidated supervision, *i.e.* if the respective bank becomes subject to another financial group subject to FINMA's consolidated supervision. Therefore, in

M&A transactions relating to a Swiss bank it will have to be assessed on a case-by case-basis what the specific regulatory implications will be under the applicable consolidation decree. This assessment will typically require an additional engagement with FINMA to ensure regulatory compliance from a consolidated perspective.

The considerations outlined above apply *mutandis mutatis* to Financial Institutions under FinIA.

(c) **Additional Changes to the Bank**: Typically, upon acquiring a majority stake in a Swiss bank, the acquiring entity will intend to make various changes to the governance structure and potentially the business model of the acquired Swiss bank. In this context, it should also be noted that changes to the board of directors or the executive committee of the bank are subject to FINMA approval, with the new members of the management bodies having to go through the regulatory fit-and-proper-test pursuant to article 3(2)(b) Banking Act prior to being appointed by the new shareholder. In addition, any changes to the articles of association and/or the organizational regulations requested by the acquiring entity will need to be pre-approved by FINMA. Finally, certain changes to the business model of the bank may require an amendment to the underlying banking license which would need to be approved by FINMA and may be subject to increased regulatory scrutiny.

The considerations outlined above apply *mutandis mutatis* to Financial Institutions under FinIA.

4) Summary

As outlined above, the acquisition of a Qualified Participation in a Swiss regulated bank or Financial Institution is subject to a *de-facto* approval requirement of FINMA and may – depending on the transaction structure – have additional regulatory implications. In addition to adhering to these regulatory requirements, in order to ensure legal certainty with regard to the respective transaction it seems advisable to adequately address these regulatory requirements as conditions to closing in the applicable transaction documentation, ensuring that the respective acquisition is only closed to the extent that all regulatory approvals are obtained and/or no objections are raised.

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Spin-off and Listing of Sunrise on the SIX and NASDAQ by Liberty Global

Reference: CapLaw-2024-86

On 16 October 2024, Liberty Global Ltd. (NASDAQ: LBTYA, LBTYB and LBTYK) and Sunrise Communications AG announced the key dates of the spin-off of Sunrise from Liberty Global. After the spin-off, Sunrise, which is Switzerland's largest private telecommunications provider, will be an independent, separate publicly traded Swiss company. As part of the spin-off, Liberty Global shareholders will receive Sunrise Class A shares and Sunrise Class B shares in the form of Sunrise Class A ADSs and Sunrise Class B ADSs. The Sunrise Class A shares will be listed on the SIX Swiss Exchange (SIX) and the Sunrise Class A ADSs will be listed on the Nasdaq Global Select Market (NASDAQ). The spin-off is subject to approval by Liberty Global's shareholders. The first day of trading on the NASDAQ and the SIX is scheduled for 13 and 15 November 2024, respectively.

Molecular Partners Offers USD 20m of American Depositary Shares

Reference: CapLaw-2024-87

On 25 October 2024, Molecular Partners AG, a clinical-stage biotech company developing a new class of custom-built protein drugs known as DARPin therapeutics announced that it had priced an underwritten offering of 3,642,988 American Depositary Shares (ADSs) representing 3,642,988 new shares at an offering price of USD 5.49 per ADS amounting to gross proceeds of USD 20m. The offering included participation from a new investor HBM Healthcare Investments Ltd, which is a leading healthcare investor, as well as multiple existing investors.

Viseca Payment Services AG Issued CHF 150m 1.350 per cent. bonds due 2029

Reference: CapLaw-2024-88

On 30 October 2024, Viseca Payment Services AG successfully completed its issuance of CHF 150m 1.350 per cent. bonds due 2029. Raiffeisen Schweiz Genossenschaft, UBS AG and Zürcher Kantonalbank acted as Joint Lead Managers.

GAM Holding AG's Rights Offering

Reference: CapLaw-2024-89

On 15 November 2024, GAM Holding AG, an independent and global asset management firm headquartered in Zurich and listed on the SIX Swiss Exchange M, completed its capital increase and rights offering with net proceeds of approximately CHF 98.2 million. The proceeds from the offering will be used to repay amounts outstanding under a loan facility granted by GAM's anchor shareholder, Rock Investments SAS, and any residual amount will be used for general corporate purposes. Helvetische Bank acted as Settlement Agent for the transaction.

EQT, ADIA and Auba's placement of Galderma Group AG Shares

Reference: CapLaw-2024-90

On 25 November 2024, Sunshine SwissCo AG (a consortium led by EQT), together with ADIA and Auba Investment Pte. Ltd., successfully placed 16,000,000 shares in Galderma Group AG at a price of CHF 80.00 per share via an accelerated bookbuilding process. The placement raised CHF 1,280 million in total.

McDonald's Corporation issued CHF 550m bonds in aggregate in the Swiss market

Reference: CapLaw-2024-91

On 26 November 2024, McDonald's Corporation closed the issuance of two series of CHF bonds, CHF 300,000,000 1.050% Notes due 2028 and CHF 250,000,000 1.30% Notes due 2032. The bonds were issued under McDonald's Corporation's USD 20,000,000,000 Global Medium-Term Notes Program. The bonds have been admitted for provisional trading and will be listed on the SIX Swiss Exchange. BNP Paribas (Suisse) SA and Commerzbank Aktiengesellschaft acted as the Joint Lead Managers.

Public tender offer by One Equity Partners for Cicor Technologies

Reference: CapLaw-2024-92

On 12 December 2024, OEP 80 B.V. ("OEP"), an indirect subsidiary of OEP VIII GP, LLC., published a mandatory public tender offer for all publicly held shares of Cicor Technologies Ltd. (SIX: CICN) at an offer price of CHF 55.17 per CICN share (corresponding to the volume-weighted average share price during the last 60 trading days prior to the publication of the pre-announcement of the offer). Settlement of the offer is expected to occur at the end of February 2025.

Public tender offer by LPSO Holding for Orascom Development Holding

Reference: CapLaw-2024-93

On 17 December 2024, LPSO Holding Ltd ("LPSO"), the primary holding company of the Sawiris family, the majority shareholder group of ODH, published a voluntary public tender offer for all publicly held shares of Orascom Development Holding AG (SIX: ODHN; "ODH") at an offer price of CHF 5.60 per ODH share. The offer price marks a 40.7% premium over the volume-weighted average share price during the last 60 trading days prior to the publication of the offer. The offer is expected to settle in March 2025.

In light of the new data protection laws, CapLaw has released a privacy statement. The privacy statement, as updated from time to time, is available on our website (see http://www.caplaw.ch/privacy-statement/). For any questions you may have in connection with our data processing, please feel free to contact us at privacy@caplaw.ch.