

# Disclosure Office Notice

I/08

Exemptions for Banks and Securities Dealers

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## Summary:

Art. 19 FMIO-FINMA<sup>1</sup> states, that under certain conditions, banks and securities dealers need not factor in equity securities and equity derivatives to a certain extent when calculating their acquisition and sale positions.

If the shareholdings held by banks or securities dealers reach or exceed the thresholds defined within that provision, however, they must always be included for the purposes of calculating the acquisition and sale positions.

### 1. Legal grounds

In Art. 19 FMIO-FINMA, the Swiss Financial Market Supervisory Authority FINMA stipulates, that under SESTA<sup>2</sup>, when calculating their acquisition and sale positions, banks and securities dealers need not factor in equity securities and equity derivatives which they hold:

- a. in their trading portfolio, provided their share does not reach 5 percent of the voting rights;
- b. as part of security loans, security transfers or repurchase agreement (repo) transactions, provided their share does not reach 5 percent of the voting rights;
- c. only for up to two trading days and exclusively for the purposes of clearing and the settlement of transactions.

The calculation under this provision is only permitted provided there is no intention to exercise the voting rights for these shares or to influence the business conduct of the issuer in any other way, and the voting share does not exceed 10 percent of the voting rights overall.

Banks and securities dealers that are controlled, directly or indirectly, may only invoke the exemptions under Art. 19 FMIO-FINMA once within a consolidated analysis on the level of the ultimate controlling person, and not per legal entity holding equity securities or equity derivatives as a bank or securities dealer.

#### 1.1. Equity securities and equity derivatives in the trading portfolio

Providing the equity securities and equity derivatives held in the trading portfolio do not reach 5 percent of the voting rights of the issuer in either the acquisitions or sale positions, they need not be included when calculating the acquisition and sale positions of a bank or securities dealer. Trading portfolio refers to the items falling under trading activities in accordance with margin no. 363 FINMA Circular 2015/1 Accounting – Banks of 27 March 2014.

«Trading means entering into actively managed positions in order to profit from fluctuations in the market price with an ongoing willingness to increase, decrease, close or hedge the risk position. It also includes the intention to generate profits from arbitrage. The classification in the trading portfolio is to be established and documented accordingly when the transaction is concluded. Results from trading activities are to be reported only in the income statement items *Result from trading activities and the fair value option* and *Interest and dividend income from trading portfolios* as appropriate, provided the option to offset the refinancing result for trading positions in accordance with margin no. 56 is not exercised.»<sup>3</sup>

If the share of the acquisition or sale positions held within the trading portfolio reaches or exceeds the voting share of 5 percent in an issuer, the exemption may no longer be claimed and both the

<sup>1</sup> 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).

<sup>2</sup> Swiss Federal Act on Stock Exchange and Securities Trading (Stock Exchange Act, SESTA) of 24 March 1995 (CC 954.1).

<sup>3</sup> ARB, see <<https://www.finma.ch/en/-/media/finma/dokumente/dokumentencenter/myfinma/rundschreiben/finma-rs-2015-01.pdf?la=en>>.

acquisition and the sale positions in the trading portfolio must be included and disclosed when calculating the voting share.

### **1.2. Security loans, security transfers or repo transactions**

Banks and securities dealers need not include equity securities and equity derivatives held by them as part of security loans, security transfers or repo transactions, as defined in Art. 17 FMIO-FINMA, when calculating the acquisition and sale positions. This exemption is also limited to voting shares not exceeding 5 percent.

If the share of the acquisition or sale positions held as part of security loans, security transfers or repo transactions reaches or exceeds the voting share of 5 percent in an issuer, the exemption may no longer be claimed and both the acquisition and the sale positions must be included and disclosed separately when calculating the voting share.

### **1.3. Clearing and settlement of transactions**

Equity securities and equity derivatives held solely for the purposes of clearing and the settlement of transactions for no more than two trading days (D+2) following completion of the transaction in question (the binding transaction), need not be included by banks and securities dealers when calculating their acquisition and sale positions.

Unlike both of the foregoing exemptions under Art. 19, para. 1, letters a and b FMIO-FINMA, the drafter of the ordinance did not set a limitation at 5 percent of the voting rights for this exemption. A limitation occurs indirectly however due to the upper limit of 10 percent of the voting rights under Art. 19, para. 2 FMIO-FINMA.

## **2. No intention to influence the business conduct of the issuer and 10 percent of voting rights as upper limit**

The calculation under Art. 19, para. 1, letters a to c FMIO-FINMA is permitted provided both of the conditions below are met:

- there is no intention to exercise the voting rights for the shares in question or to influence the business conduct of the issuer in any other way, and
- the voting share does not exceed 10 percent of the voting rights overall.

The upper limit of 10 percent of the voting rights overall is justified, given that, with a voting share of 10 percent and more, there is a significant potential to influence the business conduct of the issuer even without exercising the voting rights.

If the total of the equity securities and equity derivatives held reaches or exceeds 10 percent of the voting rights in an issuer, the exemptions under Art. 19, para. 1 FMIO-FINMA may no longer be invoked and all positions, in other words, both acquisition and sale positions, must be disclosed.

## **3. Separate examination of acquisition and sale positions**

The exemptions provided for in Art. 19 FMIO-FINMA apply to the acquisition and the sale positions individually. Thus, for example, if a bank holds acquisition positions equivalent to less than 5 percent of the voting rights in its trading portfolio and also sale positions equivalent to less than 5 percent of the voting rights in its trading portfolio, it need not include these acquisition and sale positions when calculating its positions, providing the other requirements are met.

This separate examination of the acquisition and sale positions is also to be applied when calculating the upper limit of 10 percent of the voting rights pursuant to Art. 19, para. 2 FMIO-FINMA.

Whereas, if in spite of the exemptions set out in Art. 19 FMIO-FINMA, a threshold requiring notification is reached, exceeded or fallen below in the acquisition or sale position, the holdings in the respective other position must also be disclosed.

However, in accordance with Art. 14, para. 1, letter a, no. 1 FMIO-FINMA, the voting shares of the acquisition position are not to be considered separately,. Thus, for example, if a bank holds both shares equivalent to 4 percent of the voting rights and acquisition rights equivalent to 4 percent of the voting rights within the trading portfolio, then these shares and acquisition rights are not covered by the exemption under Art. 19, para. 1, letter a FMIO-FINMA due to the total equivalence of 8 percent of the voting rights, and must be included when calculating the acquisition positions.

#### **4. Foreign banks and securities dealers**

Swiss banks and securities dealers must be state approved and are subject to special supervision. For this reason, the exemptions set out in Art. 19 FMIO-FINMA always apply to them.

Banks or securities dealers domiciled abroad may invoke the exceptions under Art. 19 FMIO-FINMA provided they also meet the requirements for approval specified in Art. 3 BankA<sup>4</sup> and Art. 10 SESTA in conjunction with Art. 41 SESTO<sup>5</sup>, in other words, the institution is in particular:

- adequately organised and has the necessary financial resources to permit a sound and lasting business operation, and
- is subject to appropriate supervision.



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

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<sup>4</sup> Swiss Federal Act on Banks and Savings Banks (Banking Act, BankA) of 8 November 1934 (CC 952.0).

<sup>5</sup> Ordinance on Stock Exchange and Securities Trading (Stock Exchange Ordinance, SESTO) of 2 December 1996 (CC 954.11).