

Disclosure Office Notice

III/00

Indirect Acquisition and Indirect Sale – Control over Legal Entities

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Summary:

Not only the direct, but also the indirect acquisition of equity securities and equity derivatives can trigger a notification duty. In particular, an acquisition by a controlled legal entity is regarded as an indirect acquisition.

Any party holding the majority of the voting rights in a legal entity generally controls that entity, even if the control is not exercised by the legal entity. However, a legal entity can also be controlled by a person who does not hold a voting majority. This can be the case, for example, due to a qualified minority shareholding or based on provisions of a contract or the articles of association.

Finally, it is possible for multiple people to jointly control a legal entity.

1. Legal grounds

Not only the direct acquisition or direct disposal of equity securities and equity derivatives can trigger a notification duty, but also the indirect acquisition and indirect disposal (Art. 120, para. 1 FMIA¹). Beneficial owners of equity securities and equity derivatives are subject to the notification duty. A beneficial owner is the party who controls the voting rights stemming from a shareholding and bears the associated economic risk (Art. 10, para. 1 FMIO-FINMA²).

In particular, the acquisition and disposal through directly or indirectly controlled legal entities and the acquisition and disposal of a shareholding that directly or indirectly transfers control of a legal entity which also directly or indirectly holds equity securities qualify as an indirect acquisition or indirect disposal of a shareholding (Art. 11 FMIO-FINMA). With this in mind, the question arises as to the conditions under which control of a legal entity is to be assumed for the purposes of this provision.

2. Control of legal entities

Whether or not a legal entity is controlled as defined by Art. 11 FMIO-FINMA must be assessed in each case individually. In particular, a shareholder controls a company when they hold the majority of the voting rights in the legal entity in question. It is not a requirement for control that said shareholder actually exercises that control. The objective capability to control the legal entity that holds the equity securities or equity derivatives is sufficient.

A legal entity can also be jointly controlled by multiple people. If, for example, multiple shareholders that hold together the majority of the voting rights in a legal entity, exercise their voting rights in the legal entity in question uniformly on the basis of coordination, then they jointly control the legal entity. This means that these shareholders are the joint beneficial owners of all the equity securities and equity derivatives held directly or indirectly by the legal entity.

Control of a legal entity may also be present without the voting majority in the legal entity in question belonging to a single shareholder or to multiple shareholders together. In particular, if a shareholder holds a qualified minority shareholding and the remaining shareholders each hold small shares, meaning that the qualified shareholder can effectively control the company, then the requirements of control as defined in Art. 11 FMIO-FINMA are met.

It is also conceivable for provisions of a contract or the articles of association to result in someone controlling a legal entity. For example, a shareholder may be authorised, on the basis of a contrac-

¹ Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act, FMIA) of 19 June 2015 (CC 958.1).

² 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).

tual agreement or provisions of the articles of association, to appoint the majority of members of the management body.

The foregoing list of circumstances which might result in control is not exhaustive. As previously mentioned, whether or not a legal entity is controlled for the purposes of Art. 11 FMIO-FINMA must be assessed in each case individually taking all of the circumstances into consideration.



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