

An Overview of Stock Exchange Law Compliance

Requirements, risks and recommendations



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An Overview of Stock Exchange Law Compliance Requirements, risks and recommendations

1. Introduction

In Switzerland, stock exchanges and securities trading are subject to various legal norms to be adhered to by market participants. In this sense, "*Stock Exchange Law Compliance*" is to be construed as conduct and a concept that ensure that the board of directors, management and employees of listed companies adhere to the statutory, regulatory and internal corporate requirements, including standards and professional standards that are customary in the market.

The following comments are aimed at providing companies that are listed on the main Swiss stock exchange, SIX Swiss Exchange (SIX), or are planning to become listed with an *overview of the key stock exchange law requirements* (sections 2 and 3). This incorporates the SIX Stock Exchange Rules completely overhauled as of 1.7.2009. Consideration is given to both the Main Standard (formerly "Main Segment") and the Domestic Standard (formerly "Subsidiary Segment" or "SWX Local Caps").

The *risks* and *sanctions* that apply in the event of non-adherence to the requirements are also set out as part of this overview (section 4) and *recommendations* are given as to how the stock exchange law compliance can be arranged (section 5).

2. Norms in respect of stock exchange law compliance

The stock exchange law requirements that apply in Switzerland are not set out in a single act, but are rather spread over various federal acts and orders, rules and directives of various institutions.

2.1 Federal acts

The following federal acts contain provisions on stock exchange law (published at www.admin.ch/ch/e/rs/rs.html):

- ▶ Federal Act on Stock Exchanges and Securities Trading (SESTA);
- ▶ Stock Exchange Ordinance (SESTO);
- ▶ Stock Exchange Ordinance of the Swiss Financial Market Supervisory Authority (SESTO-FINMA).

The stated acts emanate from the federal legislature or the Swiss Financial Market Supervisory Authority (FINMA), the government supervisory authority for banks, insurance companies, stock exchanges and securities dealers and for additional financial intermediaries (www.finma.ch). FINMA regularly publishes circulars with oversight regulations and guidance concerning current issues and its corresponding practice.

2.2 SIX Swiss Exchange Bodies and Rules

In application of the principle of separation of powers, SIX has the following *regulatory bodies* at its disposal:

- ▶ The Regulatory Board, formerly called "Zulassungsstelle", i.e. "Admission Office" (rules);
- ▶ the SIX Exchange Regulation division (implementation of rules);
- ▶ the Sanction Commission, the Appeals Board and the Board of Arbitration (legal review).

On the basis of the Federal Stock Exchange Act and the Stock Exchange Ordinance, the Regulatory Board has issued Listing Rules, Additional Rules as well as various Directives [*comprehensively revised as per 1.7.2009* (www.six-exchange-regulation.com/regulation_en.html)].

These rules of SIX apply as part of the so-called "Self-Regulation" of the stock exchange (Art. 4 SESTA) and are subject to authorisation by FINMA. The rules do not constitute statutory legal norms but rather private law norms. Nevertheless, all stock exchange participants are required to adhere to them.

Furthermore, the Regulatory Board issues numerous circulars and notices on a regular basis, explaining the relevant provisions and the current practice adopted by SIX (e.g. Communiqué no. 4/2011 of 29.9.2011 regarding areas of focus when reviewing 2011 annual financial statements). In addition, the website contains application and reporting forms in order to fulfil various stock exchange law obligations.

2.3 Acts of the Swiss Takeover Board

A separate government authority is responsible for the takeover of listed shareholdings: the so-called "Swiss Takeover Board" is entrusted with the task of defining principles and holds responsibility for adherence to provisions on public tender offers. It is comprised of expert representatives of securities dealers, listed companies and investors.

The Swiss Takeover Board issued the Takeover Ordinance (TOO) and Regulations (R-TB) based on SESTA, and published explanatory circulars and notices (www.takeover.ch).

2.4 Recommendations of *economiesuisse*

Furthermore, *economiesuisse*, the umbrella organisation representing the Swiss economy, has issued non-binding recommendations on Corporate Governance of Swiss public companies, the so-called "Swiss Code of Best Practice for Corporate Governance" (SCBP). The SCBP can be downloaded from the *economiesuisse* website by using the search function (www.economiesuisse.ch/web/en).

3. Contents of stock exchange law compliance

In terms of content, the stock exchange law lays down (1) authorisation obligations for the activities of securities dealers, (2) the prerequisites of admitting securities and securities dealers to the stock exchange and (3) rules of conduct for the individual market participants, in particular the securities dealers and the listed companies.

The following comments are aimed at providing an overview of the key requirements of stock exchange law compliance. In this respect, prime importance is attached to the point of view of the issuers, i.e. the listed companies. By contrast, obligations that apply to the securities dealers are not set out in greater detail.

3.1 Admission of securities to the stock exchange

3.1.1 Definition of securities

Securities within the meaning of SESTA are, on the one hand, standardised *securities* suitable for mass trading (e.g. certificated bearer and registered shares) and *book-entry securities* that are not certificated but have the same function as shares, and *derivatives* on the other hand (Art. 2 lit. a SESTA).

The following overview focuses primarily on *equity securities*, such as shares, participation and profit-sharing certificates, shares in cooperatives and fund units.

Reference is also made at this point to the new *Intermediated Securities Act*, which came into force on 1.1.2010 and, which is relevant first and foremost to listed securities.

3.1.2 Listing Rules

SIX has issued Listing Rules (LR) based on Art. 8 SESTA. The Listing Rules contain requirements on the fungibility of securities and specify the information that investors require to assess the characteristics of securities and quality of the issuer (Art. 8 para. 2 SESTA).

(I) Scope and subject matter

The Listing Rules apply merely to the admission of securities to stock exchange trading ("*Secondary Market*") and, by contrast, not to the issue and bringing into circulation of new securities ("*Primary Market*").

The Listing Rules provide mainly for the *prerequisites of admitting* equity rights to stock exchange trading ("*listing*") and the conditions for *maintaining the listing* (reporting obligations and other obligations in respect of furnishing information).

On the one hand, the Listing Rules provide for the *admission to the Main Standard* (formerly: "*Main Segment*"). On the other hand, they also contain *special provisions* for areas that are subject to other regulatory standards. These include investment and real estate companies, global depository receipts and collective investment schemes and companies of the so-called "*Domestic Standard*".

(II) Domestic Standard

The Domestic Standard in accordance with the new Listing Rules - called "*SWX Local Caps*" prior to 1.7.2009 - is geared towards the listing of equity securities of companies which do not (yet) qualify for a listing in accordance with another standard due to their investor basis, company history, capitalisation or diversification. This applies, in particular, to companies of local significance or those with a close group of investors.

The stock exchange law requirements in accordance with the Domestic Standard are less stringent in some aspects compared with the Main Standard, for example in respect of the applicable accounting standards (Swiss GAAP FER instead of the more complex IFRS or US GAAP; see paragraph 3.2.3 I). This has created a situation in which some companies have effected a change from the Main Standard to the Domestic Standard or are considering such a change, or only have shares listed under the Domestic Standard from the outset.

The special features for the admission to the Domestic Standard are provided for in Art. 85 et seq. LR.

(III) Additional listing rules

The Listing Rules form the basis for the Additional Rules, the Other Rules and further regulations of SIX (in particular Directives):

The *Directives* are aimed at providing a supplementary and detailed explanation of the regulatory provisions. The *Additional Rules* contain specific requirements for listing bonds, derivatives, and so-called exchange traded products. The *further regulations* provide for the admission to trading in the "*Sponsored Segment*" and the admission to trading of international and delisted bonds. These areas are not addressed below.

In accordance with the statutory requirements (Art. 8 para. 3 SESTA), SIX's Listing Rules take into consideration *internationally recognised standards*. The Listing Rules are geared towards the corresponding directives of the European Union, among others. These include:

- ▶ The so-called Admission Directive (79/279/EEC);
- ▶ the so-called Interim Reporting Directive (82/121/EEC);
- ▶ the so-called Prospectus Directive (2003/71/EC);
- ▶ the Directive 2003/6/EC on Insider Dealing and Market Manipulation (so-called Market Abuse Directive).

3.1.3 Listing prerequisites

Art. 9 - 26 LR and the various Directives specify the demands placed on issuers and the securities that need to be met for listing in the *Main Standard*. These include, for example, adherence to pertinent company law requirements, the existence of the company and the accounting in accordance with a standard accepted by the stock exchange (see section 3.2.3) for at least three years prior to the listing application, a government-supervised auditing company as auditing body, reported equity capital of at

least CHF 25 million on the first trading day and adherence to the requirements on marketability and denomination of securities and their public distribution (so-called "Free Float", see Directive on the Distribution of Equity Securities; DDES).

In the *Domestic Standard*, it is sufficient if the company has existed for at least two years and if the annual financial statements have been prepared in respect of two full financial years prior to the listing application in accordance with the corresponding accounting standard (Swiss GAAP FER) (Art. 85 and 86 LR). The reported equity capital must only be at least CHF 2.5 million on the first day of trading, i.e. a tenth of the Main Standard requirement (Art. 87 LR). The requirements regarding security diversification among the public (Free Float) are also less demanding (Art. 88 LR).

Exemptions from the minimum age requirement for the company that is to be listed are permitted both in the Main Standard and the Domestic Standard in accordance with the Directive Track Record (DTR). In addition, the Regulatory Board may also authorize, subject to certain conditions, exceptions from other provisions of the Listing Rules and make such authorized exceptions subject to terms and conditions (Art. 7 LR).

3.1.4 Disclosure requirements in respect of the listing

The Listing Rules contain disclosure requirements in respect of the listing. A *listing prospectus* (Art. 27 - 36 LR) and a *listing notice* (Art. 37 - 40 LR) are specified. Other disclosure requirements also apply (Art. 41 LR).

The stated provisions set out in detail the corresponding content and formal requirements, the exemption options and exceptions. The listing prospectus is to state details by way of a comprehensive scheme. In the case of a complex financial history, additional details are to be provided (see Directive Complex Financial History; DCFH).

3.1.5 Listing procedure

Art. 42 - 48 LR provide for the listing procedure that is set in motion when the application is submitted by a recognised representative. The application is to be submitted with SIX Exchange Regulation, the implementation and monitoring body of SIX. Thereupon, the Regulatory Board reviews the application including all the submitted documents (the listing prospectus and notice, among others). If the listing prerequisites are met, the application is approved - subject to conditions where applicable.

The Regulatory Board may reject an application in spite of the fact that it fulfils the listing requirements where this would be in the interest of the general public (Art. 9 para. 2 LR). It is recommended that possible problematic issues be discussed with SIX prior to filing the application.

3.2 Maintaining the listing

The prerequisites for a listing in accordance with section 3.1.3 must largely be met during the entire listing period (Art. 26 LR). Furthermore, the Listing Rules provide for

specific conditions for maintaining the listing (Art. 49 - 56 LR): Prime importance is given to *periodic reporting*, which is closely associated with the requirements regarding accounting and corporate governance. Additional *obligations to furnish information* apply, in particular the so-called "Ad Hoc Publicity" and the disclosure of management transactions.

The above-mentioned transparency requirements are predominantly aimed at guaranteeing the proper functioning of the capital market, and intend to provide reasonable information to (potential) investors. The corresponding requirements of the Listing Rules are addressed in the following sections.

3.2.1 Corporate calendar

The issuer must draw up a corporate calendar containing the key dates (e.g. annual general meeting, publication of the annual financial statements) in respect of the listing and on an ongoing basis at the start of each financial year, and submit it to SIX Exchange Regulation (Art. 52 LR). This is the only new condition for maintaining listing since 1.7.2009.

3.2.2 Periodic reporting

Each year, the issuer must publish its *annual report*, including the auditor's report (Art. 49 LR). The issuers of listed equity securities have to publish a *six-monthly statement*, which, however, need not be audited (Art. 50 LR). The annual and interim reports are to be prepared in accordance with an accounting standard accepted by the Regulatory Board (Art. 51 LR).

3.2.3 Financial reporting requirements

The *Directive on Financial Reporting (DFR)* contains the accounting standards accepted by the Regulatory Board of SIX (I). The DFR also provides for the demands placed on interim reporting (II) and the publication and submission of annual and interim reports (III).

(I) Accepted accounting standards

Issuers of equity securities with registered offices in Switzerland that are listed in the Main Standard of SIX must either apply the "International Financial Reporting Standards" (*IFRS*) or the "United States Generally Accepted Accounting Principles" (*US GAAP*) as the accounting standard (Art. 6 para. 1 DFR).

By contrast, companies subject to the *Domestic Standard* are free to apply the less stringent *Swiss GAAP FER*. The same applies to:

- ▶ Issuers that are subject to the Standard for Real Estate Transactions (Art. 6 para. 2 DFR);
- ▶ issuers with registered offices in Switzerland that have only debt securities listed in the Main Standard, namely bonds and derivatives (Art. 7 DFR).

Issuers without a registered office in Switzerland may apply the accounting standard of their *country of origin* if

such a standard is accepted by the Regulatory Board (Art. 8 and Annex 1 DFR).

Banks, securities dealers, central mortgage bond institutions with registered offices in Switzerland and collective investment schemes are subject to the respective *special laws* applying to them. With regard to the regulation and oversight of *audit bodies*, it is moreover, not SIX, but rather solely the Federal Audit Oversight Authority (FAOA) who has jurisdiction.

(II) Interim reporting

As regards interim financial statements, the same accounting standard is to be applied as the one that applies to the annual financial statements (Art. 9 para. 1 DFR).

Depending on the applicable standard, interim financial statements are to be prepared according to the following rules (Art. 9 para. 2 - 5 DFR):

- ▶ *Swiss GAAP FER*: interim financial statements in accordance with Swiss GAAP FER 12. In addition, issuers with registered offices abroad must at least adhere to the requirements of this standard as regards stating details and disclosure.
- ▶ *IFRS*: interim reporting according to IAS 34.
- ▶ *US GAAP*: interim reporting according to APB Opinion No. 28, additional disclosure of abridged balance sheets and cash flow statement and the abridged statements of changes in equity capital (in each case including the previous year).

(III) Publication and submission

According to Art. 5 DFR, the *publishing* of the annual and interim report is understood to mean the announcement to all shareholders and market participants, whereby the announcement must be in line with the requirements on Ad Hoc Publicity (see section 3.2.5).

The published annual and interim financial statements are to be made available for a period of five years on the issuers' websites *in electronic form* (Art. 13 DFR).

Submission is understood to mean the provision of the annual and interim report in paper form to the SIX Exchange Regulation (Art. 5 and 12 DFR). The respective statement must either be submitted as printed matter, i.e. as a "glossy prospectus" of the company for the public, or, if this is not available, in the form of regular documents. The latter must contain a legally valid signature.

The *annual report* containing the annual financial statements must be published *within four months* of the appointed date for the annual financial statements, and submitted to the SIX Exchange Regulation upon publication at the latest. Issuers, who have only issued debt securities, must only publish their annual report on a website, starting from the 2011 financial year (Art. 10 DFR).

As regards the *interim report*, a corresponding publication and submission period of *three months* applies following the appointed date of the interim financial statements, unless

an order of the Regulatory Board stipulates a shorter period (Art. 11 DFR).

3.2.4 Corporate Governance

(I) Definition and subject matter

"Corporate Governance" is understood to mean the principles and rules for governing and controlling companies. The established definition is as follows: "*Corporate governance encompasses the full range of principles directed towards shareholders' interest seeking a good balance between direction and control and transparency at the top company level while maintaining decision-making capacity and efficiency*" (see SCBP; section III below).

Based on the Listing Rules, the Regulatory Board has issued the *Directive on Corporate Governance (DCG)*, which specifies the additional information that must be incorporated in the annual reporting. This includes details on the "structure and function of corporate management and governance" (Art. 49 para. 2 LR). In this context, a Directive on Management Commentary (DMC) is being prepared. Issuers are to be required to publish key data from the perspective of management, regarding the relationship between a company's assets, financials and income situation and its goals and strategies. The consultation deadline in connection with the planned DMC was 18.10.2011.

(II) Details required in the annual report

According to DCG (including the Annex), the following detailed information on the following areas of Corporate Governance is to be published in the annual report:

- ▶ *Group structure and shareholders*: including significant shareholders, cross-shareholdings;
- ▶ *Capital structure*: including the changes in capital over the last three years, details of convertible bonds and options;
- ▶ *Board of directors (BoD) / executive committee (ExCo)*: including internal organisational structure, vested interests, definition of the areas of responsibility between BoD and ExCo, information and oversight instruments (e.g. internal audit, risk management as well as management information systems), management contracts;
- ▶ *Compensation, shareholdings and loans* regarding BoD and ExCo; in addition to analogous application of disclosure obligations pursuant to Art. 663b^{bis} Swiss Code of Obligations (CO) for issuers having their registered office abroad and who are not listed there (see sections 3.2.6 and 3.3);
- ▶ *Shareholders' participation rights*: including voting rights and representation restrictions, quorums;
- ▶ *Changes of control and defence measures*: duty to make an offer and clauses on changes of control;
- ▶ *Auditing body*: including duration of the mandate, fees;
- ▶ *Information policy*: frequency with which and form in which information is given to the shareholders.

The Annex to the DCG contains a comprehensive list of the necessary details. The principle of "*comply or explain*" applies in accordance with Art. 7 DCG. If the issuer decides not to disclose certain information, such action is to be justified in the annual report on a case by case basis and in detail.

SIX has published a comprehensive *commentary* on the DCG (status: 20.9.2007) and additional information in this respect.

(III) Swiss Code of Best Practice (SCBP)

For the sake of completeness, reference is made to the SCBP of *economiesuisse* that sets out the prerequisites and guiding principles of Corporate Governance in the form of recommendations. The SCBP addresses the Swiss public companies and key non-listed companies. Individual points concern institutional investors and intermediaries. In essence, the SCBP contains 30 recommendations concerning shareholders, board of directors, management, audit, as well as disclosure. However, as part of the stock exchange law compliance, prime importance is given to DCG because, as opposed to SCBP, the DCG is binding for the issuers of listed securities.

3.2.5 Ad Hoc Publicity

This term is understood to mean the *obligation to disclose potentially price-sensitive facts* in accordance with Art. 53 LR: The issuer must inform the market of new, i.e. not publicly known facts of relevance to prices that have occurred in its sphere of activity. In this respect, SIX has issued the *Directive on Ad Hoc Publicity (DAH)*, which describes this obligation in concrete terms.

Price-sensitive facts are understood to mean those events which are capable of triggering a significant change in market prices. An assessment is to be made within the meaning of a forecast regarding whether or not the event exerts an influence on the average market participant in respect of its investment decisions (purchase, sell or hold). That is to be assumed in individual cases if a price change is to be expected that is considerably greater than the usual price fluctuations (Art. 3 and 4 DAH). Both company-specific and market-related elements are to be included in these considerations.

The assessment of the relevance to prices in a specific case is a complex undertaking. Typical *examples* include: substantial acquisitions or M&A transactions, serious profit changes, reorganisation cases, comprehensive liability cases, changes regarding the main business activity, the organisational or capital structure and personnel changes (board of directors, management and auditors). For example, acquisitions of insignificant proportions are not subject to disclosure.

Any potentially price-sensitive fact must be published without delay. The obligation to disclose applies from the *time* when the issuer gained knowledge of the key aspects of such a fact (Art. 5 DAH). An obligation to publish does not (as yet) apply as long as the issue consists of rumours,

ideas or planning versions and the likelihood of realisation is low. However, the practice of SIX concerning M&A transactions is rather restrictive, and under certain circumstances assesses the initiation of discussions in view of a possible transaction as a fact that is subject to the obligation to disclose - not only at the time at which specific contractual negotiations are held or during due diligence.

The information provided for the public is aimed at guaranteeing *equal treatment* of the market participants (Art. 6 et seq. DAH). The *notification* is therefore to be made such that all parties have the same opportunity to become aware of it. Selective information violates the principle of equal treatment. The burden of proof regarding equal treatment of and correct information for all market participants lies with the issuer.

Disclosure to the public is to be made, where possible, at the latest 90 minutes prior to the start of trading, or after closing (Art. 11 DAH). Ad hoc announcements are to be provided to the SIX Exchange Regulation at the latest at the same time they are made available to the public. Where, in special circumstances, e.g. during a press conference or after an "information leak", it becomes unavoidable to disclose such information to the public during trading hours or less than 90 minutes prior to the start of trading, then the announcement must be provided to SIX at the latest 90 minutes prior to the planned disclosure, to the SIX Exchange Regulation (Art. 12 DAH).

In addition to the SIX Exchange Regulation, ad hoc announcements must also be made to two information suppliers (e.g. Bloomberg and Reuters), as well as to two Swiss newspapers of national importance and any interested party upon request. Simultaneously, all ad hoc announcements must be made available on the issuer's website, where they must remain retrievable for a period of two years.

The *content* of the notifications must enable an average market participant to assess the relevance to prices. The information must be factual, clear and complete, and must otherwise be corrected without delay (Art. 15 DAH).

Under certain circumstances, the issuer may make use of a so-called *postponement of disclosure*, i.e. justifiably postpone the notification of potentially price-sensitive facts. However, this is only permissible if the fact that is subject to disclosure is based solely on a plan or a decision by the issuer. In the event of an M&A transaction, for example, this applies only until the involved parties have definitively reached an agreement by way of a contract, because after such an agreement the issuer can no longer decide alone whether or not the transaction is to be carried out. Furthermore, the dissemination of the fact must be capable of prejudicing the issuer's legitimate interests, and the issuer must ensure that the price-relevant fact remains confidential throughout the period of the postponement of disclosure. In the event of an "information leak" against the issuer's will, the market must be informed of the fact immediately, since otherwise the equal

treatment of all market participants will no longer be guaranteed (Art. 54 LR).

The stock exchange law practice in respect of Ad Hoc Publicity poses difficult interpretation and demarcation questions. On 1.5.2005, SIX published a comprehensive *commentary* on DAH.

3.2.6 Disclosure of Management transactions

According to Art. 56 LR as per its amendment on 1.4.2011, each primary listed company (issuer) is required to ensure that the *members of the board of directors and the management* report to it without delay all transactions with participatory rights (e.g. shares), of the issuer or with associated financial instruments (e.g. options, convertible bonds) *at the latest on the second trading day* following conclusion of the action that imposes a legal obligation, or in the case of stock market activities following completion of the transaction. The disclosure of such "management transactions" is aimed at promoting the supply of information to investors, as well as preventing and tracking market abuse. Details are provided for in the Directive on Management Transactions (DMT) (see the corresponding commentary of SIX, updated per 4.5.2011).

The issuer is required to make available to the SIX Exchange Regulation certain details subject to reporting obligations (*inter alia*, the function of the person subject to reporting obligations, the type and total number of traded rights and the price of the transactions, among others) *within three trading days* of receipt of the notification via the electronic reporting platform. SIX shall make information thus notified available to the public for a period of three years.

Contrary to previous rules, the reporting obligation exists for each transaction regardless of its value (until 30.3.2011: reporting obligation only where the threshold of CHF 100,000 is exceeded). The members of the BoD and the ExCo shall be subject to reporting obligations if the transaction has a direct or indirect impact on their wealth and the person subject to reporting obligations is able to influence the transaction. This also applies to transactions within the framework of an asset management agreement of a person subject to reporting obligations and transactions of closely related persons that have been performed under significant influence of the person subject to the reporting obligation. The term "closely related" also includes e.g. companies at which the person subject to the reporting obligation holds a leading position or control (Art. 3 DMT).

Subject to reporting obligations are the acquisition, sale and the granting (subscription) of participatory rights and financial instruments. *Not subject to reporting obligations* on the other hand, are pledging, usufruct, securities lending, inheritance, donations or liquidation of marital property (Art. 5 DMT). There is likewise *no reporting obligation* if a person, for example, has been granted shares or options on a fixed basis as a salary element on the basis of

the employment relationship. By contrast, the sale of such rights would be subject to the reporting obligations (Art. 7 DMT). Finally, not subject to reporting obligations are transactions of the company itself.

The issuer forwards the transactions reported by its management to the SIX Exchange Regulation using an *electronic reporting and publication platform*. Details in this respect are set out in the Directive on Electronic Reporting and Publication Platforms (DERP) (Art. 8 DMT).

In respect of the so-called "Insider Dealing" see section 4.2.1.

3.3 Additional key publication requirements

The conditions for maintaining listing addressed in section 3.2 contain various "listing law" requirements in respect of disclosure. In addition, stock exchange participants are required to adhere to statutory disclosure requirements. The key statutory publication requirements of CO and SESTA are set out below.

3.3.1 Disclosure of remuneration and credits

Among other things, the company law financial reporting requirements specify the details that are to be stated in the notes to the annual financial statements (Art. 663b CO). Listed companies are required to provide additional details.

Art. 663b^{bis} para. 1 CO specifies that listed public limited companies must disclose all *remuneration* in the notes that they have paid directly or indirectly *to the following persons*:

- ▶ Current members of the board of directors, the management and, where applicable, the advisory board of the company that is subject to disclosure requirements;
- ▶ former members of the stated bodies (insofar as the remuneration is associated with the former activity as executive body of the company or are not customary in the market);
- ▶ persons who are close to the persons stated above (insofar as the remuneration is not customary in the market).

As a general rule, the term *remuneration* is to be construed in a broad sense and applies, in particular, to fees, wages, bonuses, employer's contributions to statutory and occupational pension schemes ("AHV", pension fund), severance payments, allowances in the form of shareholdings and options, benefits in kind, the provision of securities or waiving claims in favour of the stated persons (Art. 663b^{bis} para. 2 CO). In this respect, it is irrelevant whether the remuneration is provided by the company subject to disclosure (directly) or via third parties (indirectly).

In accordance with Art. 663b^{bis} para. 3 CO, all outstanding *loans and credits* granted to the stated persons are also to be stated in the notes. In the case of former executive body members and persons close to them, the details

need only be provided if the conditions under which the loans are granted are not customary in the market.

The *scope of disclosure* of remuneration and loans includes, in each case, the total amount for the board of directors, the management and, where applicable, the advisory board. As regards the board of directors and advisory board, the amounts attributable to each member are also to be stated as well as their names and functions. As regards management, merely the highest paid amount, including the name and function of the respective member, must be stated. Remuneration and loans to associated persons are to be stated separately. The names of these persons need not be stated.

Compliance with the provision of stock corporation law contained in Art. 663b^{bis} CO is only examined by the SIX Exchange Regulation and where necessary sanctioned, where the issuer is not a public company or has its registered office abroad (see Annex to DCG, section 5.2; Communiqué No. 3/2011 of the Six Exchange Regulation dated 23.8.2011, paragraph B).

Furthermore, the *principles of proper accounting* must be observed, in particular the principles of accuracy, clarity, significance and due care. Among other things, this plays a key role in the assessment and itemisation (level of detail) of the remuneration.

The *background* of the obligation to disclose remuneration and loans is moreover such that, in accordance with valid law, managing executive bodies may determine their remuneration themselves (mutually) and quasi grant themselves loans. This poses the risk of a conflict of interests and false incentives. The stated publication requirements are aimed at informing the capital market of corresponding risks, strengthening controls by shareholders and disciplining the executive bodies.

In this context, reference is made to the popular initiative "Against fat-cat salaries" and the ongoing revision of stock corporation and accounting law. The *problem of excessive remuneration* within publicly listed companies is to be countered by way of strengthening shareholders' rights, by granting the annual general meeting the capacity to authorise the total remuneration of the board of directors and by tightening the rules surrounding the duty of care and obligation to reimburse on the part of managing executive bodies. Discussions in the Federal parliamentary chambers on the legislative amendments will presumably last until 2012.

3.3.2 Disclosure of shareholdings / obligation to report

Company law states that the major shareholders of listed companies as well as the shareholdings and other book-entry securities regarding the companies held by their own management are to be stated in the notes to the annual financial statements. Stock exchange law specifies an obligation to report in the event that certain threshold values (in % of voting rights) are reached. These legal norms are aimed at informing the (potential) investors and

minority shareholders of the controlling status of a company.

(I) Company law obligation to disclose

In accordance with Art. 663c CO, the *identity of key shareholders and their respective participations in the company* are to be stated in the notes "insofar as these are known or should be known". Therefore, on the one hand, shareholders who are known on the basis of the stock exchange law report (see the following section II) must be stated. On the other hand, shareholders are to be stated who should be known within the company, which, on the basis of the shareholder register, applies in particular in the case of registered shares.

Major shareholders are understood to be shareholders and shareholders' groups with restricted voting rights whose shareholdings exceed 5% of all voting rights (Art. 663c para. 2 CO). Possible lower percentage limits in the articles of association regarding the keeping of registered shares also apply to the obligation to disclose (Art. 685d para. 1 CO). Holders of participation or profit-sharing certificates and owners of convertible bonds and option rights are not subject to the obligation to disclose.

The *ownership structure of the current members of the board of directors, the management and, where applicable, the advisory board*, including the holdings of persons close to them are also to be stated (Art. 663c para. 3 CO, see sections 3.2.4 II and 3.2.6). All types of holdings (shares, participation and profit-sharing certificates) in the respective company and the appertaining convertible bonds and option rights held by the stated persons are subject to the obligation to disclose. The name and function of the respective member and details of the held shareholdings and rights must be stated. The associated persons need not be stated; their positions should be allocated to the respective member.

In this context, see also the provision in criminal law on "Insider Dealing" (section 4.2.1).

(II) Stock exchange law obligation to report

In practice, the stock exchange law obligation to report is of greater significance than the stated company law obligation to disclose:

Art. 20 para. 1 SESTA specifies a *public law obligation to disclose* for any person who *acquires or sells shares or acquisition or sales rights regarding shares* (e.g. options, convertible bonds) of a company with its registered office in Switzerland, whose shareholdings are at least in part listed on a Swiss exchange, and therefore reaches, exceeds or falls below the limit of 3, 5, 10, 15, 20, 25, 33^{1/3}, 50 or 66^{2/3} % of the voting rights. Merely temporarily "touching" the limit during a trading day need not be disclosed.

Acquisition is also understood to mean the conversion of participation certificates or profit-sharing certificates into shares and exercising convertible bonds/acquisition

rights. The *sale* is equated with exercising sales rights (Art. 20 para. 2 SESTA).

It is irrelevant whether or not the acquisition or the sale is carried out *directly, indirectly or following joint consultation with third parties or as an organised group*. At all times the resulting economic entitlement, and not the formal legal structuring of the transaction (e.g. via intermediate legal persons) is authoritative.

The *obligation to disclose on the part of the buyer/seller* applies in relation to the company and SIX. It arises at the time of the action that imposes a legal obligation, i.e. the creation of the legal claim to acquisition/sale, and not only when the transaction is completed. Notification by the respective person must be received in writing by the company and SIX within four trading days after the obligation to disclose arose (Art. 22 para. 1 SESTO-FINMA).

For its part, the *company* must publish the notification within two trading days of receipt of the notification (Art. 22 para 1 SESTO-FINMA). To this end, the *electronic reporting and publication platform* of SIX must be used (see Directive on Electronic Reporting and Publication Platforms; DERP). Where the disclosure communication is potentially relevant to the share price, the provisions on ad-hoc publicity must also be complied with (section 3.2.5).

The *supervision and implementation* of the obligation to disclose are incumbent upon FINMA. FINMA has provided specific information on the obligation to disclose in its Stock Exchange Ordinance (Art. 2 et seq. SESTO-FINMA). The Ordinance regulates important matters such as scope and content of the obligation to disclose, special facts that are subject to disclosure, calculating limits and details on disclosure and publication.

In the event of important reasons FINMA may, following a request, grant *exceptions and alleviation* in respect of the obligation to disclose and publish, in particular if the transactions are of a short duration or subject to conditions, or if there is no intention to exercise the voting rights (Art. 24 SESTO-FINMA).

3.4 Public purchase offers

This term includes all offers for purchase or for the exchange of listed equity securities - in particular shares - of Swiss companies that are geared publicly towards the owners of such equity securities (Art. 2 lit. e SESTA).

Both the seller and the respective "target company" whose equity securities are involved are subject to *statutory obligations*, which are provided for in detail in Art. 22 et seq. SESTA and Art. 28 et seq. SESTO-FINMA. These are mainly content-related and formal requirements regarding offer submission (e.g. obligation to publish the offer in a prospectus, principle of equal treatment) and regarding the conduct of the target company (among other things the obligation to make a statement in accordance with Art. 29 SESTA, and the restriction of defence measures).

The obligations in conjunction with public purchase offers apply irrespective of whether or not the takeover offer is voluntary or specified by law. In addition to the *voluntary takeover offer* - which is "friendly" or "unfriendly" depending on the assessment by the target company - a statutory *obligation to make an offer* applies: If a party acquires equity securities of a company directly, indirectly or following joint consultation with third parties, and 33^{1/3}% of the voting rights is thus exceeded in conjunction with the securities that this party already holds, an offer must be made for all listed equity securities of the company (Art. 32 SESTA).

By way of a *clause set out in the articles of association*, each (target) company may exclude the applicability of the provisions on the obligation to make an offer (so-called *opting out*) or render the obligation to make an offer conditional on a higher limit (up to 49% of the voting rights at most; so-called *opting up*).

During a public offer a *heightened and extended obligation to disclose* applies compared with Art. 20 SESTA (see section 3.3.2 II): The offerer or party that disposes directly or indirectly or by way of joint consultation with third parties of a shareholding of at least 3% of the voting rights of the target company or of the company whose equity securities are being offered for exchange, must disclose to the Swiss Takeover Board and the Stock Exchange each transaction with equity securities of this company from the publication of the offer until expiry of the offer period (Art. 31 para. 1 SESTA).

The general *supervision* is incumbent upon FINMA. However, the Swiss Takeover Board (TOB) created for this specific purpose is responsible for the actual monitoring of adherence to the provisions regarding the public purchase offers. It reviews adherence to the provisions regarding public purchase offers in individual cases (Art. 23 para. 3 SESTA) and may also grant exceptions from the obligation to make an offer (Art. 32 para. 2 SESTA). Detailed rules on public takeovers are stated in the Takeover Ordinance issued by TOB (TOO) and in the appertaining Regulations (R-TB).

4. Risks in respect of inadequate stock exchange law compliance

4.1 SESTA sanctions

For intentional violation of the *disclosure obligations* in accordance with Art. 20 and 31 SESTA (see sections 3.3.2 II and 3.4), a penalty shall be inflicted, which shall, at most, amount to double the purchase or sales price of the shareholding that is not disclosed (Art. 41 SESTA). In the case of negligence, the penalty may extend to CHF 1 million. Whereas minor transgressions (e.g. slight delays when notifying) have up to now mostly been dealt with relatively informally, from 2011 it is the declared intention of FINMA to implement a stricter practice. In addition, the exercise of voting rights, by a person who acquired or sold a shareholding in contravention of the aforemen-

tioned disclosure obligations, is to be subject to a court-imposed suspension lasting up to five years (Art 20 para. 4^{bis} SESTA).

If the target company violates the statutory obligations to which it is subject in conjunction with the *comments on a public takeover offer*, it may, in the case of intent, be punished by way of the imposition of a penalty of up to CHF 500,000 (Art. 42 SESTA). In the case of negligence, the upper limit is CHF 150,000. Additional sanctions provided for in SESTA apply to breaches of obligations by securities dealers (Art. 42a SESTA) and violations of the obligation to maintain professional secrecy, including by executive bodies and stock exchange employees (Art. 43 SESTA).

Despite more than 600 suspected cases over the last few years, apparently there was only one single instance of a fine being effectively handed down under the SESTA. In particular, cases involving some spectacular contraventions of reporting obligations (e.g. OC Oerlikon, which incurred a record-breaking fine of CHF 40 million before the first instance) ultimately ended with acquittals or in suspended proceedings.

The relevant statutory criminal norms will be dealt with before the sanctions imposed by SIX are addressed as part of the private law self-regulation (see section 4.3).

4.2 Sanctions set out in PC (Swiss Penal Code)

In conjunction with listed companies, the Swiss Penal Code (PC) renders the following intentional acts subject to criminal prosecution. A term of imprisonment of up to three years or a fine may be imposed in each case.

4.2.1 Utilising knowledge of confidential information ("Insider Dealing"), Art. 161 PC

"Insiders" within the meaning of this criminal norm includes, in particular, the members of the board of directors and the management and their representatives. In accordance with Art. 161 PC, these persons are prohibited from making use of knowledge of a confidential fact whose disclosure will considerably influence the price of the listed securities, book securities or options of the company in a foreseeable manner, or providing a third party with such information and, as a result, providing themselves or others with a pecuniary advantage.

Example: Manager A becomes aware of a planned merger with the company Y Ltd on the basis of his activity for the listed company X Ltd. Prior to the expected considerable price increase (+ 10% or more), he therefore purchases securities in X Ltd and makes a profit after the public announcement of the merger. A has rendered himself liable to prosecution.

According to prevailing opinion, the *company* cannot itself be its "own insider". If X Ltd thus repurchases its own shares in light of the merger, this does not constitute insider dealing.

By way of analogy to the Ad Hoc Publicity in accordance with Art. 53 LR (see section 3.2.5), *events of relevance to prices* within the meaning of Art. 161 PC can consist of structural changes of the company as well as other significant facts, such as public purchase offers, extraordinary profits or losses, extraordinary business developments, restructuring measures, the launch or recall of key products, new distribution partners or personnel changes in key positions of the company management, as well as other unexpected and significant occurrences.

Contrary to EU law (Market Abuse Directive), there is currently no obligation in Switzerland to prepare so-called *insider lists*. A corresponding regulation was, however, proposed as a draft in the new Listing Rules of SIX, but was subsequently withdrawn.

See section 4.3 on the planned legislative amendments.

4.2.2 Price manipulation, Art. 161^{bis} PC

The group of perpetrators for this criminal act is wider than in the case of insider dealings and applies to any person who *provides misleading information or carries out fictitious trades* to considerably influence the stock exchange price of traded securities and obtain a pecuniary advantage for themselves or others.

By contrast, so-called "parking", i.e. immobilisation of a share package with a view to restricting the market or mere "price maintenance" by way of buying and selling, is normally not deemed a criminal act.

See section 4.3 on the planned legislative amendments.

4.2.3 False details about commercial activities, Art. 152 PC

This provision may, for example, be relevant in the case of honouring obligations in respect of the listing (e.g. obligation to issue a prospectus, see section 3.1.4) and in respect of Ad Hoc Publicity (see section 3.2.5).

In this respect, members of the board of directors and the management may not provide any *"false or incomplete details of considerable importance"* or arrange for such to be provided, which may give rise to damaging asset disposals by other persons - including the (potential) investors.

It is controversial whether or not the failure - i.e. a complete lack of provision of information which, on the basis of the obligation to provide Ad Hoc Publicity, would actually be called for - is punishable in accordance with this provision.

4.3 Planned Legislative Amendments

On 31.8.2011 the Federal Council sent to parliament a message regarding amendments to SESTA. The planned legislative amendments foresee a tightening of the rules concerning stock exchange crimes and abusive market behaviour. By more efficient sanctions against abusive market behaviour, the integrity and competitiveness of

Switzerland as a financial centre are to be strengthened with a view to international rules.

In this context, bans on insider dealing and share price manipulation are no longer to be governed by the PC but rather by the SESTA as well as being qualified as preparatory acts of money laundering. In addition, an adjustment to the substantive content of what constitutes statutory insider dealing and a streamlining of proceedings are foreseen. The maximum fine in the event of an intentional breach of the obligation to disclose shareholdings shall, in future, amount to CHF 10 million (see the current rules in section 4.1). The amended SESTA shall enter into force at the earliest per 1.1.2013.

4.4 SIX Swiss Exchange sanctions

In addition to the stated statutory criminal provisions, SIX imposes various sanctions as part of the self-regulation of the stock exchange.

4.4.1 Reasons for sanctions

A sanction may be imposed if the issuer violates regulations issued by SIX, i.e. the *Listing Rules*, the *Additional Rules* or the *Implementation Rules (including the Directives)* - in particular a violation of the obligations stated therein to furnish information, collaborate or provide details - or if the issuer does not ensure adherence to these (Art. 60 LR).

The stock market bodies can, however, *in principle, not impose sanctions for violations of State laws* such as SESTA, CO or PC (except in the case of contraventions of art. 663b^{bis} CO by foreign issuers; see section 3.3.1). Pursuant to Section 9.5 of the trading rules of SIX which came into force per 1.7.2011, it is the independent oversight body Surveillance & Enforcement which must inform FINMA or, where necessary, the law enforcement agencies in case of any suspicion of a breach of the law.

In *practice*, sanctions are precipitated in respect of Financial Reporting (17), Ad Hoc Publicity (15), Management Transactions (10), Corporate Governance (5) and so-called Regular Reporting Obligations (6). The figures in parenthesis correspond with the number of published sanctions since 1.1.2007, when a new sanctions policy came into force (total: 53 / October 2011; source: www.six-exchange-regulation.com/enforcement; "Decisions").

4.4.2 Type of sanctions

Art. 61 para. 1 LR provides for the following sanctions against issuers, guarantors and recognised representatives:

- ▶ Reprimand;
- ▶ fine of up to CHF 1 million (in cases of negligence) or CHF 10 million (in cases of wrongful intent);
- ▶ suspension of trading (discontinuation of trading);
- ▶ delisting (deletion of listing);
- ▶ reallocation to a different regulatory standard;

- ▶ exclusion from further listings;
- ▶ withdrawal of recognition.

The stated sanctions may also be precipitated on a cumulative basis. Legally binding decisions can be published, albeit as a general rule this is done anonymously.

SIX's sanction policy has only distinguished between negligence and intent since 1.7.2009. The maximum fine was increased sharply (previously CHF 200,000). Henceforth, it also takes into account the impact of the sanctions on the respective issuer (Art. 61 para. 2 LR). In addition, the audit bodies of the listed companies are not subject to the sanction regulations and the executive bodies of SIX, but rather are solely subject to the Federal Audit Oversight Authority.

In practice, reprimands and fines have been issued almost exclusively since 1.1.2007. The fines were at most CHF 100,000, half the maximum amount prior to 1.7.2009. The other, severe sanction options have - according to the information available - never been imposed since the beginning of 2007. The last sanction-related delisting took place in 2003.

4.4.3 Proceedings

The sanction proceedings are based on the Rules of Procedure of SIX Exchange Regulation, which were amended at the beginning of 2007. The Sanction Commission is normally responsible for imposing a sanction. It consists of five to eleven members. The Chairman of the Sanction Commission and half the members are elected by the Regulatory Board, while the other members are determined by the board of directors of SIX Group Ltd.

The decisions of the Sanction Commission can be forwarded to the independent Appeals Board within 20 trading days in accordance with Art. 9 SESTA or disputed by way of an action brought before the Board of Arbitration of SIX.

4.5 Additional risks

In addition to the stated sanctions, the violation of stock exchange law norms may have other negative consequences for the company, in particular the additional cost of solving the caused problems (binding internal resources for the subsequent correction of failings, the cost of proceedings, fees of external consultants, etc.) or the loss of trust and reputation in the market and among the public.

5. Recommendations

Observing and the adherence to stock exchange law requirements, - compliance - is a mandatory element of "good corporate governance" of listed companies. On the basis of the obligation to provide ultimate supervision set out in Art. 716a para. 1 subpara. 5 CO, it is the concern of the board of directors to ensure that a compliance organisation is implemented which is reasonable for the respective company.

Fundamental elements of properly functional compliance include superiors setting a good example, clear internal company instructions, and standardised processes, communication channels and control mechanisms.

The following information is aimed at providing an overview of preventive compliance measures.

5.1 Instructions on "hot topics"

Dealing with central risks should be provided for in a systematic manner. This applies, in particular, to *Reporting, Ad Hoc Publicity and Management Transactions*, which frequently give reasons for sanctions by SIX (see sections 3.2.2/3.2.5/3.2.6 and the end of section 4.4.1 herein above).

Ideally, internal written instructions should be drawn up for each area and a process sequence should be defined as a guide for the employees. The instructions should contain the key provisions and rules of conduct and the authorities and responsibilities in each area.

The precautions that can be taken can be illustrated in conjunction with the *Insider Dealing* provision (see section 4.2.1). In addition to the promulgation of special rules ("Insider Policy"), the following measures are, for example, conceivable:

- ▶ General employee training;
- ▶ explicit reference to the criminal norm prior to instituting an insider-relevant project;
- ▶ keeping an up-to-date "insider list" (see end of section 4.2.1);
- ▶ ban limited in time on trading in securities of the company ("close period") for persons with "insider knowledge";
- ▶ setting up an internal company notification channel in respect of the acquisition, keeping and sale of securities of the company (form, electronic platform).

Particular attention should be paid to the obligations in respect of Financial Reporting - not least on the basis of the sanction statistics (see end of section 4.4.1). In this respect, actively exchanging ideas with the auditors may be advisable.

5.2 Creating a compliance department

Comprehensive stock exchange law compliance entails setting up an "independent", separate compliance department, which is separated from the operating business in terms of organisation, and which is, depending on the requirements, managed by one or more individuals (e.g. position within the legal team or the finance department). Such a department acts as a contact point for compliance questions. The compliance department should have access to all key information, and have at its disposal appropriate resources and support within the company. Ultimately, the compliance department supports the company management and the board of directors with the continual adherence

to stock exchange law requirements - and possibly other requirements.

5.3 Supplementary measures

General rules of conduct can be set out in a *Code of Conduct* applying to the board of directors, the Management and all other employees. This also includes standards for appropriate conduct in respect of honouring special obligations of listed companies (e.g. adherence to stock exchange laws and other regulations, avoiding conflicts of interest, notifying the compliance department of illegal conduct or conduct in breach of the requirements).

In the case of uncertainty as regards stock exchange law compliance in a specific case, it may also be useful to obtain *comments or a preliminary decision* from the pertinent authority or instance, or seek legal advice.

Abbreviations

FAOA	Federal Audit Oversight Authority
BoD	Board of Directors
ExCo	Executive Committee
CHF	Swiss Francs
CO	Swiss Code of Obligations
DAH	Directive on Ad Hoc Publicity
DCFH	Directive Complex Financial History
DCG	Directive on Corporate Governance
DDES	Directive on the Distribution of Equity Securities
DERP	Directive on Electronic Reporting Platforms
DFR	Directive on Financial Reporting
DMT	Directive on Management Transactions
DTR	Directive Track Record
EU	European Union
FER	Swiss professional recommendations for accounting (in German: „Fachempfehlungen der Rechnungslegung“)
FINMA	Swiss Financial Market Supervisory Authority
GAAP	Generally Accepted Accounting Principles
IAS	International Accounting Standards
IFRS	International Financial Reporting Standards
LR	Listing Rules
M&A	Mergers & Acquisitions
PC	Swiss Penal Code
R-TB	Regulations of the Swiss Takeover Board
SCBP	Swiss Code of Best Practice for Corporate Governance
SESTA	Federal Act on Stock Exchanges and Securities Trading
SESTO	Stock Exchange Ordinance
SIX/SWX	Swiss stock exchange
TOO	Takeover Ordinance of Swiss Takeover Board

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