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Revision of the Rules on Ad Hoc Publicity: A Closer Look and Q&A

On 30 April 2021, SIX Exchange Regulation revised its Listing Rules (LR) to amend the rules on ad hoc publicity as well as the Directive on Ad Hoc Publicity (DAH) and the Directive on Corporate Governance (DCG). The new rules introduce several important changes for issuers:

(a) a duty to flag ad hoc disclosures,

(b) changes to the definition of price-sensitive facts, including

(i) a reference to the reasonable market participant,

(ii) the repeal of the *per se* practice, according to which certain events were deemed *per se* to constitute price-sensitive event except annual reports and interim reports which continue to remain *per se* price-sensitive events – going forwards events will need to be disclosed only if, based on a case-by-case analysis, they are expected to be price-sensitive,

(c) the introduction of an express duty to take organizational measures if an issuer decides to defer a disclosure, and

(d) the duty to disclose quiet periods.

The new rules will enter into force on 1 July 2021.

In this Advestra Insight, we analyse the revision and provide a Q&A.

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1 INTRODUCTION

After a long silence following a consultation process in 2019, the SIX Exchange Regulation announced on 30 April 2021 a revision of the Listing Rules as well as the Directive on Ad Hoc Publicity and the Directive on Corporate Governance. The revised rules will enter into force on 1 July 2021.

Under article 53 LR, issuers are, as a matter of principle, required to inform the market of any price-sensitive facts which have arisen in their sphere of activity.

The revision affects the way ad hoc disclosures need to be communicated and published by requiring them to be flagged as such.

Furthermore, the rules change the scope of the disclosure duty and abolish the *per se* practice. Therefore, going forward, no event will be *per se* deemed to be price-sensitive (except for the publication of the annual and interim reports) but a case-by-case analysis will be necessary. Moreover, the revised rules amend the terminology used to define a price-sensitive information by referring to a "reasonable market participant" rather than an average market participant.

They also introduce a duty to use adequate and transparent internal rules or processes to ensure the confidentiality of price-sensitive facts, when issuers rely on an exemption to defer the disclosure. Finally, the rules require a disclosure of quiet periods as part of the information on corporate governance.

The revised rules will affect issuers of all securities listed on SIX Swiss Exchange, although issuers of primary-listed equity securities will have the greater exposure to the changes than issuers of other instruments listed on SIX Swiss Exchange. However, the revised ad hoc publicity rules are not applicable to non-Swiss issuers whose securities are also listed in their home country and the revised corporate governance rules are not applicable to issuers of secondary-listed equity securities on SIX Swiss Exchange.

2 DUTY TO FLAG AD HOC DISCLOSURES

The revised rules require issuers to flag disclosures of price-sensitive facts pursuant to the Listing Rules as such by including a classification "Ad hoc announcement pursuant to article 53 LR" (article 53 (2^{bis}) LR) at the beginning of the announcement.

Furthermore, the issuers will need to flag ad hoc disclosures on their website with the same flag (article 9 (1) DAH) allowing investors to find and identify ad hoc disclosures easily. Additionally, all disclosures will need to remain available for a period of three years, instead of two years as was the case under the current rules.

Until now, no such flagging obligation existed, and an issuer could in doubt voluntarily publish an event without any adverse consequence. Going forward, issuers will need to consider whether a fact is price-sensitive or not, even if they decide to release a disclosure. Issuers are expressly cautioned against misusing ad hoc disclosures for marketing and the Issuers' Committee Circular N°1 expressly threatens to sanction misuse of the flag for notices that purely serve marketing purposes. Nevertheless, we believe that, in doubt, issuers should err in favor of flagging using their latitude in discretion and judgment and, by excess of caution, flag disclosure as being price-sensitive if they cannot reach a clear-cut conclusion. Such disclosures do not constitute, in our view, a misuse of the flag and hence should not be the basis for taking sanctions against issuers. Otherwise, the new rules would have a chilling effect on corporate disclosure, which would go against the very purpose of the rules which seek to ensure transparency and equal treatment of investors. However, issuers should also be wary of over-reporting and the consequences thereof (see also *Q&A—Are issuers entitled to discretion in flagging a disclosure as being ad hoc publicity?*).

Finally, issuers of primary-listed equity securities will be required to send their announcements to SIX Exchange Regulation

using the CONNEXOR platform as of 1 October 2021, whereas other issuers will be allowed to use other channels, such as email, to communicate with the exchange.

3 SUBSTANTIVE CHANGES TO THE DISCLOSURE DUTY

3.1 No More *per se* Price-Sensitive Facts

The revision of the Directive Ad Hoc Publicity expressly puts an end to the former practice on *per se* price-sensitive facts. Going forward, except for annual reports and interim reports, no facts will be deemed *per se* price-sensitive (article 4 (2) DAH *in fine*).

Issuers must therefore consider on a case-by-case basis prior to the announcement whether the fact is price-sensitive (article 4 (2) DAH), and whether it would affect the investment decision of a reasonable market participant (article 53 1bis LR). This applies, in particular, to changes within the board of directors and the executive management which are deemed to be *per se* price-sensitive under the current regime regardless of market expectations. The publication of the annual report and interim results, however, remain to *per se* price-sensitive facts.

While this change will increase the compliance burden for issuers, it will limit the number of formal disclosures and also help avoiding "technical breaches" due to mismanagement of the communication of minor changes within the board of directors or the executive management of issuers.

3.2 Price-Sensitive Facts

The revision amends the definition of price-sensitive facts to cover only price-sensitive facts instead of merely "potentially price-sensitive facts". However, the substance of the definition remains unchanged: a fact will continue to remain price-sensitive if "it is capable of triggering a significant change in market prices" (article 53 (1) LR). Therefore, as expressly stated in the guidance on the revision included in the Issuers' Committee Circular N°1, para. 5, the change is merely linguistic and should not change the duty itself.

The new rules further codify that the test should be applied from an *ex ante* perspective, prior to the disclosure (article 4 (2) DAH). An issuer will therefore have complied with its obligations, if *ex ante* it reached the conclusion that the fact was not price-sensitive, even if, against the expectations of the issuer using its discretion (see article 4 (3) DAH), the disclosure of a fact leads to a major change in the share price. Conversely, the fact that the market does not move after the disclosure does not *per se* mean that a fact was not price-sensitive and that the issuer made a mistake by flagging the disclosure as being made under article 53 LR. If an issuer acted in good faith based on the information available prior to the disclosure, it should not be exposed to any sanctions.

Moreover, issuers will be entitled to exercise "discretion, taking into account the company's internal division of responsibilities" (article 4 (3) DAH). Regarding the use of discretion by issuers for the determination of price sensitivity, see *Q&A—Are issuers entitled to discretion in flagging a disclosure as being ad hoc publicity?*.

The new rules further specify in line with case-law on insider trading that the test is relative and that the significance of a price change is not defined in absolute terms or fixed percentages but by reference to usual price fluctuations (art. 53 (1) LR; comp. BGE 145 IV 407, c. 3.4.1). The expected fluctuation must in other words be greater than the usual price fluctuations. Therefore, a volatile stock will need a greater change to reach the threshold than a more stable security. While this is in essence a codification of existing practice, it brings welcome clarity to issuers. See also *Q&A—Is there a quantitative threshold in absolute terms or in percentage for a price fluctuation to be deemed price-sensitive?*

3.3 Reasonable Market Participants

The definition of price-sensitive facts was further amended, indirectly, by replacing the reference to average market participants by a reference to a "reasonable market participant" (article 53 (1bis) LR). Going forward, the standard will be set by considering whether a rationally acting person who is familiar with the issuer and the market for the financial instrument would be affected by the fact. The rational market participant will be expected to know the fundamentals of securities trading, corporate law and financial market practice, but will not have any special expertise nor will it necessarily be a professional investor (Issuers Committee Circular N° 1, para. 9).

This definition aligns the rules on ad hoc publicity with the practice of FINMA in connection with insider information codified in FINMA Circular 2013/8, N 10, which also defines price-sensitivity by reference to a "reasonable investor who is familiar with the market", the precedents of the Swiss Federal Supreme Court (BGE 145 IV 407, c. 3.4.1) and the definition of inside information under article 7 (2) of the EU Market Abuse Regulation (MAR).

This change therefore narrows the gap between the definition of price-sensitive facts that need to be disclosed under the Listing Rules and insider information under article 2 (j) of the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 19 June 2015 (FMIA).

4 INTERNAL RULES AND PROCESSES TO MAINTAIN CONFIDENTIALITY

The Listing Rules provide for an exemption from the duty to disclose price-sensitive facts and permit issuers to postpone the disclosure of a price-sensitive fact, if the fact is based on a plan or decision of the issuer and its dissemination might prejudice the legitimate interests of the issuer (article 54 (1) LR).

However, whereas the current rules only require the issuer to ensure that price-sensitive facts remain confidential during the entire time that the disclosure is postponed, the revised rules are more explicit and require issuers to have "adequate and transparent internal rules or processes in place to ensure that the price-sensitive facts remain confidential" (article 54 (2) LR). In particular, the Listing Rules expressly require the issuer to take organizational measures to ensure that confidential facts are only disclosed to persons who need to perform the tasks assigned to them, thus enshrining the "need to know" principle, which is already anchored under the safe harbour to insider trading provided for by article 128 of the Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 25 November 2015 (FMIO).

The guidance published in the Issuers Committee Circular N°1, para. 17, specifies that issuers remain free to choose the organizational methods and instruments for ensuring confidentiality, but also that it expects issuers to maintain "internal rules, processes and measures in line with the latest developments and best practice with regard to safeguarding confidentiality and ensure that the rules comply with the relevant standard of a listed company." It further states that "'best practice' may include" the following measures:

- limiting the number of people who know the information to the smallest possible number (the "need-to-know" principle);
- limiting and safeguarding access to information;
- confidentiality declarations from all people who know the information, both internal and external (e.g. consultants); and
- maintaining a list of insiders.

While the ultimate duty to ensure the confidentiality remains unchanged and falls short of mandating issuers to maintain insider lists as under article 18 MAR, this

development raises the burden on issuers who will be required to provide evidence that they have implemented "adequate and transparent" measures to ensure the confidentiality to determine whether they were entitled to defer disclosure.

Moreover, while the list of measures included in the Issuers Committee Circular N°1, para. 17 is purely exemplative and, consequently, non-binding on issuers, it puts the onus on issuers to decide not to take a measure which was deemed to be part of the "best practice" to prove that they nevertheless had "adequate and transparent rules and procedures" in place.

5 BLACKOUT PERIODS

As a further measure, issuers will need to publish as part of their corporate governance disclosure in their annual report the general quiet periods (also known as blackout periods) during which corporate executives generally do not talk to market participants and analysts. The disclosure should report information, in particular on the timing of the period, the addressees, its scope and any exceptions (item 10, Annex DCG). As with all information in the corporate governance report, the information is retrospective and covers the period prior to the balance sheet date, and issuers are not required to publish planned quiet periods.

As with the rest of the corporate governance disclosures, the comply or explain principle applies and issuers may decide not to release information on their quiet periods but need to explain why they decided to do so (article 7 DCG). As a practical matter, this option is unlikely to be used as it will be challenging to bring a credible explanation why an issuer should not disclose its general quiet periods.

6 OUTLOOK

The revision of the rules on ad hoc publicity is an important departure from the prevailing approach to ad hoc publicity under the Listing Rules.

First, they require issuers to distinguish clearly their disclosure duties from their investors relations process by flagging ad hoc announcements pursuant to article 53 of the Listing Rules as such. This change should make it easier for investors but also regulators, supervisors and federal prosecutors to identify announcements aimed at disclosing price-sensitive facts.

Second, they also mark an increasing alignment of the rules on ad hoc publicity, which are promulgated and administered by SIX Exchange Regulation directly under the supervision of FINMA with the rules against insider trading of the FMIA, which are enforced by FINMA and, with respect to the criminal law offences, the Office of the Attorney General of Switzerland and the federal criminal courts. While differences between the two sets of rules remain, this is a step towards the approach taken by the MAR in the EU, which uses ad hoc publicity as a tool against insider trading rather than an instrument aiming at more transparency.

In this context, we expect that the new rules will not only contribute to more transparency on the market for listed securities but may also spillover into an increased use of these instruments in connection with investigations of suspected insider dealing.

Ultimately, the revision calls for more formalized internal rules and processes to deal both with disclosure of price-sensitive facts and with taking appropriate and transparent measures to ensure that the information remains confidential. Issuers should therefore consider whether their internal rules and process are adequate and transparent and, if necessary, adjust them to meet the new requirements in time for their entry in force.

Q&A

What changed?

SIX Exchange Regulation revised the Listing Rules, the Directive on Ad Hoc Publicity and the Directive on Corporate Governance regarding the announcement of price-sensitive facts to include (a) a new obligation to flag announcements, (b) changes to the definition of price-sensitive facts, such as (i) a reference to the reasonable market participant, as opposed to the average market participant, and (ii) the repeal of the *per se* practice, except for annual reports and interim reports, (c) a duty to take appropriate and transparent internal rules and processes to ensure the confidential treatment of price-sensitive facts when disclosure is postponed, and (d) a duty to publish quiet periods as part of the corporate governance information, subject to the "comply or explain" rule.

Additional guidance on these revisions is included in the Issuers' Committee Circular N°1. By contrast, the official Commentary on the Directive on Corporate Governance was not updated.

Who is affected by the new rules?

The rules are addressed to all issuers whose securities are listed on SIX Swiss Exchange with the exception that (i) the ad hoc publicity rules are not applicable to non-Swiss issuers whose securities are also listed in their home country and (ii) the corporate governance rules are not applicable to issuers of secondary-listed equity securities on SIX Swiss Exchange.

Issuers of equity securities with a primary listing on SIX Swiss Exchange are subject to additional duties as they will be going forward required to use the CONNEXOR platform to communicate ad hoc announcements to the exchange (see also *Do I have to use the CONNEXOR platform?* hereinafter).

Other issuers can continue to use other communication channels such as email.

Are issuers entitled to discretion in flagging a disclosure as being ad hoc publicity?

Issuers can only flag announcements that are price-sensitive as ad hoc publicity. The use of the ad hoc flag for marketing purposes is an abuse and can be sanctioned.

Issuers enjoy, however, a certain discretion in determining whether an information meets the threshold or not, if they reach their finding using their internal corporate processes.

In doubt, we would take the view that an issuer can err in favor of disclosure and flagging the announcement, without being sanctioned for wrongly applying the flag.

However, issuers should be wary of systematically over-reporting as this may not only subject them to an enhanced compliance burden, which may limit their ability to engage in share buy backs or communicate with investors and the market, but also expose them to increased scrutiny from SIX Exchange Regulation.

Therefore, it is advisable to establish internal processes to determine which person or committee is responsible for reaching a conclusion on the nature of a fact. It is also of essence to ensure that the disclosure standard is applied consistently within the issuer.

How should ad hoc publicity be flagged?

Announcements should be flagged by including at the beginning of the announcement an appropriate reference to the fact that the announcement is an "ad hoc announcement pursuant to Art. 53 LR".

The issuer's website should also flag ad hoc disclosures to allow investors to at least filter announcements under article 53 LR from other press releases. The announcements must be made available in chronological

order, including the date of distribution, and flagged as such.

The announcements need to remain available on the issuer's website for a period of three years.

Do issuers have to use the CONNEXOR platform?

Issuers of primary-listed equity securities are required to use the CONNEXOR platform to communicate ad hoc announcements to the exchange as of 1 October 2021.

Other issuers can continue to use other communication channels such as email.

Will issuers be allowed to exercise discretion in their investor relations?

Issuers continue to enjoy discretion in their investor relations as long as price-sensitive facts are disclosed in a timely manner and appropriately flagged.

In particular, issuers can decide whether they intend to communicate liberally and on an ongoing basis and, thus, potentially avoid major surprises and reduce the number of price-sensitive events or be more restrictive in their communication policy and, thus, all things being equal increase the likelihood of a need to update the market when facts cross the threshold that trigger disclosure duties.

What is the practical impact that "potentially" price-sensitive information is no longer covered by the rules?

The change is purely linguistic without any modification of the legal meaning of the term. As a practical matter, price-sensitivity continues to be assessed based on the expected impact of a development. In other words, the fact that the effect on the price is not uncertain does not exclude price-sensitivity. Quite to the contrary, the reference to sensitivity should reflect the uncertain nature of the relationship between the fact that needs to be disclosed and its impact on price.

What does the change from "average market participant" to "reasonable market participant" in connection with the definition of price-sensitive facts mean in practice?

The change of definitions aligns the Listing Rules with international standards, mainly the rules applicable under MAR in the EU, and the rules on insider trading under the FMIA.

As a practical matter, the test will be based on a – normative – rationally acting person who is familiar with the issuer and the market for the financial instrument and whether such person would be affected by the fact. The rational market participant will be expected to know the fundamentals of securities trading, corporate law and financial market practice, but will not have any special expertise nor will it necessarily be a professional investor.

It will be irrelevant going forward whether an actual average market participant actually meets this definition or not.

Is there a quantitative threshold in absolute terms or in percentage for a price fluctuation to be deemed price-sensitive?

No. The guidance published in the Issuers Committee's Circular N° 1 expressly rejects the view that a given quantitative threshold in absolute terms or percentage terms triggers disclosure of a fact.

By contrast, the Listing Rules consider that a "price change is significant if it is considerably greater than usual fluctuations." In other words, the significance of a price change is relative to the ordinary volatility of the security. Even then, there is no guidance for defining the threshold for significance. By reference to statistics, however, a change that would fall outside of the 95%, or 99% confidence interval in comparison with the volatility of the listed security is likely to meet this definition.

Are price-sensitive facts always insider information and vice versa?

Formally, there are two different concepts embodied in different legal instruments (Listing Rules vs. FMIA) and interpreted and enforced by different authorities and courts (SIX Exchange Regulation vs. FINMA and Swiss federal criminal jurisdiction).

However, the revision brings the definitions closer together. Nevertheless, some important differences subsist:

— Ad hoc publicity remains focused on facts as opposed to information, although the distinction may be watered down by the fact that certain plans and intentions may have a factual nature.
— Ad hoc publicity is limited to internal facts, whereas insider information has a broader scope and developments outside the sphere of an issuer may be insider information.

Overall, we would expect all price-sensitive facts for ad hoc publicity to constitute insider information. However, not all insider information is a price-sensitive fact.

How will changes in the board of directors and/or the management board be disclosed?

Changes in the board of directors and/or the management board are no longer deemed *per se* to constitute price-sensitive facts that always need to be disclosed using the ad hoc publicity channels.

Such changes will need to be assessed on a case-by-case basis prior to the disclosure or announcement. In other words, the test will need to be made on an *ex ante* basis. By reference to recital 15 of MAR, *ex post* reactions can be used to check the presumption but cannot be used to take action against persons who drew a reasonable conclusion on the basis of the *ex ante* information. Moreover, issuers are entitled to exercise discretion in assessing such cases (art. 4 (3) DAH).

A presumption of price-sensitivity subsists in connection with annual reports and interim reports which will continue to be deemed to be *per se* price-sensitive (art. 4 (2) DAH).

What are appropriate measures to ensure confidentiality?

According to the guidance published in the Issuers Committee Circular N°1:

In general, the issuer is free to choose the organisational methods and instruments for ensuring confidentiality. The issuer is expected to keep its internal rules, processes and measures in line with the latest developments and best practice with regard to safeguarding confidentiality and ensure that the rules it adopts comply with the relevant standard of a listed company. In maintaining the confidentiality of a price-sensitive fact, «best practice» may include: (i) limiting the number of people who know the information to the smallest possible number (the «need-to-know» principle); (ii) limiting and safeguarding access to information; (iii) confidentiality declarations from all people who know the information, both internal and external (e.g. consultants); and (iv) maintaining a list of insiders.

The guidance leaves issuers the discretion to decide what measures they deem appropriate. However, their decision should be formalized in internal rules and processes. Moreover, issuers should also comply to such internal rules and processes.

Do issuers need to prepare insider lists?

Neither the revised Listing Rules nor the Directive on Ad Hoc Publicity expressly require issuers to maintain insider lists, unlike article 18 MAR under EU law. Nevertheless, the Issuers' Committee Circular N°1, para. 17, mentions insider lists among the rules and process that may be included in "best practice." Even then issuers may exercise discretion in determining when an insider list constitutes an appropriate organizational measure to maintain confidentiality.

In our view, insider lists do not contribute to "maintain confidentiality" as they do not limit the flow of information, but rather allow the monitoring of the flow. They may, however, help as a tool to increase awareness that price-sensitive facts are being disclosed or that a third party is receiving such information and, therefore, contribute to a more stringent compliance with the "need to know principle" on the disclosing end. It may also be less formalistic and bureaucratic than systemically requiring a signed non-disclosure agreement.

Considering that insider lists are required by article 18 MAR (which may apply to issuers who are subject to such requirements, because they have issued securities subject to MAR) and that they are mentioned as part of the "best practice", issuers should make a careful assessment if they decide not to maintain an insider list.

More importantly, if issuers decide to require insider lists in their internal rules and processes, they must comply with such requirements and maintain such lists when they postpone disclosure of price-sensitive facts.

Do issuers need to ask employee to sign non-disclosure agreement?

The Issuers' Committee Circular N°1, para. 17, mentions that seeking confidentiality declaration from all persons who know the information is a "best practice", but the revised rules do not mandate such declarations.

In our view, it is not necessary or advisable to systematically seek non-disclosure agreements from employees. A simple notice may suffice to meet the requirements of the Listing Rules, in particular, with respect to employees who are regularly exposed to price-sensitive facts.

Do issuers need to require non-disclosure agreements from all consultants and advisers?

Requiring a non-disclosure agreement from professional advisers who are subject to statutory confidentiality obligations, such as lawyers, auditors, banks and other financial institutions, is redundant.

Notwithstanding this, however, it is worth mentioning that in keeping with the safe harbor on permissible disclosure of inside information pursuant to article 128 (a)(1) FMIO, the issuer may need to inform consultants that they are receiving inside information and are not allowed to exploit such information.

Do issuers need to publish quiet periods?

Pursuant to the new rules, quiet periods need to be published under the corporate governance disclosure including information on the period, addressees, scope and exceptions.

This duty is subject to the "comply or explain rule" and, therefore, issuers may disregard it provided they disclose their decision and explain why they believe that it is not appropriate for them.

Do issuers need to publish ad hoc quiet periods?

No, only the general quiet periods are covered by the disclosure duty. Ad hoc quiet periods do not need to be disclosed.

When will the new rules apply?

The new rules will apply from 1 July 2021 (with the exception of the filing of ad hoc notifications on CONNEXOR which will apply from 1 October 2021).

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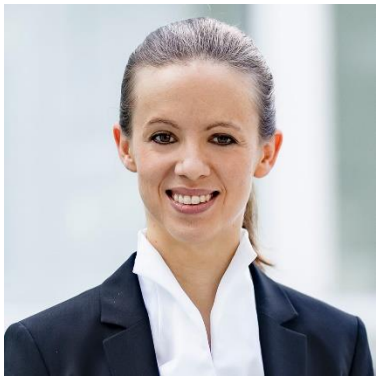

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