Dear clients and business friends,

The field of stock exchange law is yet another area where Swiss legislator is increasingly unable to remain aloof from legal developments abroad. Following, among other things, the corresponding recommendations of the intergovernmental Financial Action Task Force (FATF) and the EU’s so-called Market Abuse Directive, in autumn 2012 the Federal Parliament enacted amendments redefining criminal offenses relevant under stock exchange law (inter alia insider trading and share price manipulation), as well as enacting changes to the accompanying supervisory law. By aligning itself with international standards, Switzerland strives to strengthen its integrity and competitiveness as a financial centre. In addition, amendments have been enacted to disclosure and takeover law.

The newly enacted provisions of the Stock Exchange Act (SESTA) and its accompanying Stock Exchange Ordinance are expected to enter into force on 1 April 2013.

With a focus on the provisions concerning insider trading, we provide below an overview of the most important changes as well as some issues that may require action from the perspective of affected undertakings.

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1. Overview of the most important changes

1.1 Market abuse (insider trading / market and share price manipulation)

- Comprehensive revision and tightening of the offence of insider trading (Section 2 below);
- New definition of the criminal offense of share price manipulation and defining a qualifying statutory definition of predicate offence for money laundering;
- Transfer of the statutory definitions of insider trading and share price manipulation from the Criminal Code to the Stock Exchange Act;
- Transferring jurisdiction to prosecute insider trading and share price manipulation from cantonal authorities to the Office of the Attorney General of Switzerland and the Federal Criminal Court;
- Expansion of the regulatory ban on market abuse to encompass all market actors (Section 3 below).

1.2 Rules on disclosure and takeover

- Expansion of the scope of application of disclosure and takeover rules to companies having their registered office abroad, whose shares are “mainly listed” (hauptkotiert) in Switzerland in whole or in part;
- Establishing fines in cases of wilful breach of disclosure obligations pursuant to Art. 20 SESTA and the notification obligations under Art. 31 SESTA applicable in the context of takeovers;
- Making it a criminal offense to wilfully violate the duty to make a takeover offer pursuant to Art. 32 SESTA;
- Possibility of suspending voting rights and imposing a ban on acquisitions for violations of disclosure obligations and the duty to make a takeover offer;
- Abolition of the so-called control premium pursuant to Art. 32 (4) SESTA.

2. Exploitation of inside information as a criminal offense

By providing a less ambiguous description of what constitutes inside information (object of the crime), expanding and clarifying both the types of potential offenders and criminal actions, the statutory definition of this offense has been tightened compared to its previous version.

2.1 Object of the crime

Inside information is confidential information, the disclosure of which is likely to have a significant effect on the share price of securities that are traded on a stock exchange or similar share trading platforms in Switzerland. The term “security” has been newly defined in the SESTA, in such a way as to clarify that merely the fact that shares have been admitted for trading (and not an actual listing) “on a stock exchange or similar share trading platform” is sufficient. As in the past, share price fluctuations in excess of 5% will be sufficient in order to be deemed significant.
2.2 Types of potential offenders and criminal action

A distinction must be made between the primary insider, the secondary insider and the tertiary insider, whereby in any event, it is necessary that the perpetrator has acted with intent and procured a pecuniary advantage (for himself or others). The primary insider is first and foremost (as previously) someone who acts in his capacity as a member of an executive or oversight body (board of directors, member of the executive management) of an issuing company or a company that either controls or is controlled by the issuing company. Also new is the fact that it is not only a narrowly and exclusively defined category of persons who are in a relationship of trust (defining characteristic) to the issuing company (auditors, agents officials and their auxiliaries) who are potential primary insiders, but rather “any person, who for reasons of his or her participation or activities has, as intended, access to insider information”. This means that e.g. shareholders or subordinate employees of an issuing company can also be primary insiders.

Three variations are possible in constituting the criminal action of the primary insider:

- Exploiting, for personal ends, inside information by buying or selling securities admitted to trading or using financial instruments derived from said securities (incl. OTC products);
- Disclosing inside information to another (the secondary insider);
- New: Making a recommendation (without revealing the inside information as such) to buy or sell securities or to use financial instruments derived from such securities.

Another change is that where the primary insider acquires a pecuniary advantage in excess of CHF 1 million through his criminal action, this shall constitute a felony and thus a predicate offense for money laundering (so-called qualified offense).

A secondary insider is whoever either (as previously) has obtained inside information from a primary insider (”tippee”) or (new) has obtained this information himself by committing a felony or misdemeanor (e.g. computer hacking or theft). Here, the criminal action consists of exploiting, for personal ends, such information by buying or selling securities admitted to trading or using financial instruments derived from said securities.

New is that the tertiary insider is also included under the provisions of criminal law. A tertiary insider is someone who is neither a primary nor secondary insider, and who (e.g. coincidentally) obtains knowledge of inside information and exploits, in the same way as a secondary insider, such information for his own ends. Thus a fellow train passenger who happens to overhear some information or a cleaning employee can also be a tertiary insider.

3. Regulatory implications of exploiting insider information

In addition to criminal-law consequences, exploiting inside information also comprises regulatory consequences. Up to now the options for legal intervention by regulators – based on FinMA Circular 2008/3B – has been limited to those actors over which FinMA exercises regulatory oversight.

New is that a ban on insider trading (and on market and share price manipulation) has now been enacted that covers all market actors and that FinMA has been empowered with corresponding intervention options comprising of – in addition to compelling compliance with the duty to provide information and produce documents – the confiscation of gains. Contrary to criminal law, where prosecuting a legal entity is only conceivable under exceptional circumstances, regulatory action can also be pursued against abusive behaviour perpetrated by the issuing company itself.

Contrary to criminal law, regulatory action requires neither the ability to allocate culpability to a specific legal subject, nor that a pecuniary advantage has been obtained. Because regulatory action is not constrained by requirements as rigid as criminal proceedings, it should, as a rule, be possible to initiate it faster, as well as it likely resulting in sanctions being imposed on a more regular basis than is the case in criminal proceedings.

Because the statutory definition of insider trading has been broadly formulated, and could, under certain circumstances, overshoot the mark with regard to the conduct of issuing companies, the Federal Council will enact clarifying provisions in the context of the Stock Market Ordinance (SESTO).

4. Conclusion and recommendations

In light of the fact that the new provisions will enter into force on 1 April 2013, the expansion and tightening of the ban on insider trading (in addition to market and stock market manipulation not described in more detail here) give rise to a certain need for action on the part of listed companies, including in particular:

- Review, and – where necessary – modifications to insider trading regulations, codes of conduct and related guidelines or employment contract clauses;
- Examine the need to introduce stricter precautions on non-disclosure for projects, events and similar occurrences that could have some relevance to insider trading;
- Determine the scope of action under the SESTO when a company acquires its own shares or when buying shares in connection with a public takeover and similar transactions.

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