The Board's View

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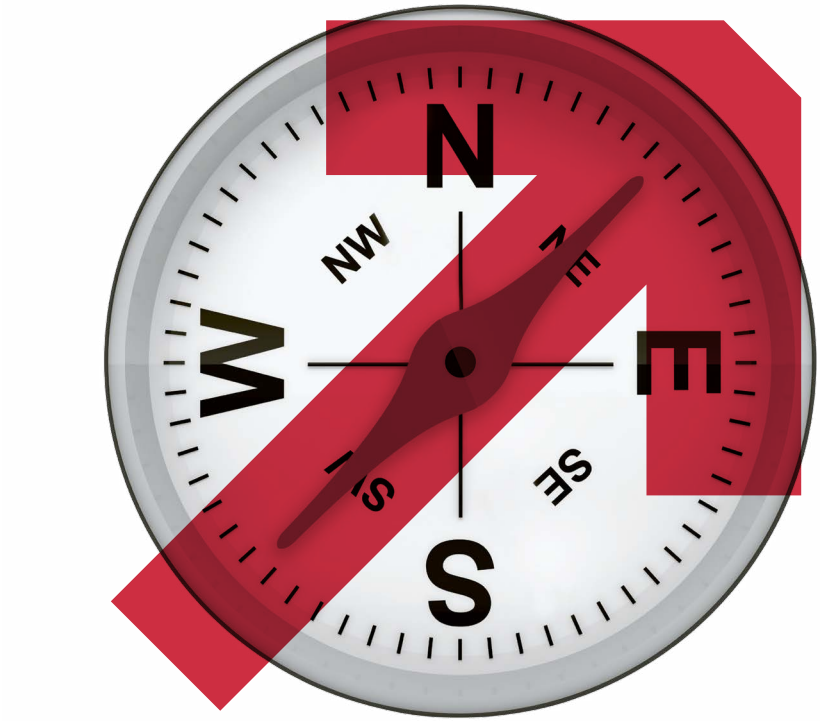
Schellenberg Wittmer



Spotlight: Ad Hoc Publicity Rules Revised

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Key Take-aways

1.
The revised SIX Listing Rules and related guidance repeal the practice *of per se* price-sensitive information and leave the determination of whether information is price-sensitive to the issuer (other than for the annual and interim reports).

2.
Ad hoc announcements containing price-sensitive information will have to be flagged as such and be made separately available and easily identifiable on the issuer's website.

3.
Issuers are required to implement adequate and transparent internal rules or processes to ensure the confidentiality of price-sensitive facts whose disclosure has been postponed.

Ad hoc publicity — or the duty of publicly traded companies to immediately communicate any events that could affect the price of their listed instruments — is a critical underpinning of the integrity of the markets. The Swiss regime rests on ad hoc disclosure requirements of the stock exchanges and insider trading prohibitions. SIX Exchange Regulation recently updated the listing rules for issuers with SIX-listed securities. The changes will become effective on **July 1, 2021**. They require to establish **new processes** that every SIX-listed company will need to implement. These changes take their cue off the **European Market Abuse Regulation ("MAR")**. However, as is typical for Swiss regulation, they follow a flexible principle-based approach.

1 What constitutes price-sensitive facts

The new rules introduce a number of refinements and revisions to the concept of price-sensitive information:

- The principle remains that a fact is to be considered price-sensitive if its disclosure is **capable of triggering a significant change in market prices.** Such determination must be made on a case-by-case basis prior to disclosure ("*ex ante* perspective"). There are no bright-line thresholds or percentages that imply significance if they are reached, exceeded or fallen short of.
- One refinement is that the assessment must be made by reference to a **"reasonable market participant"** rather than an "average market participant". The reasonable market participant is a rationally acting person who is familiar with the activity of the issuer and the market of the financial instrument in question, knows the fundamentals of securities trading, corporate law and financial market practices, but does not necessarily have any special expertise. [1] This new terminology is intended to align with international standards. It has special resonance in the wake of a resurgence in retail investing, sometimes spurred by social media platforms.
- The case-by-case, fact-dependent determination of whether information is price-sensitive has been reinforced by the new rules: They repeal the previous practice deeming certain facts to be **per se price sensitive**. This means, in particular, that changes to the board of directors and executive management of the issuer are no longer automatically deemed to be price-sensitive. The only exception concerns the annual and interim reports, which are always required to be paired with an ad hoc announcement.
- An issuer is protected in its *ex ante* determination if **made in good faith**, even if the market turns out to react significantly to an announcement or news that was not flagged as price sensitive. Experience however shows that it may be difficult to overcome conclusions on the significance of a set of facts made with the benefit of hindsight. Accordingly, issuers may err on the side of caution. As has been the case for many years, releases of financial figures, changes in management, mergers, takeovers, restructurings, recapitalizations, material changes in business operations, materialization of key risks (e.g., regulatory investigations), and financial restructurings will continue to be critical areas of ad hoc disclosure.

Ad hoc announcements to be flagged: "Ad hoc announcement pursuant to Art. 53 LR".

2 "Flagging" of ad hoc announcements

In line with MAR, SIX-listed issuers will be required to disclose price-sensitive facts by means of an **ad hoc announcement specifically identified as such:**

- An ad hoc announcement must be prefaced by a clearly visible legend "Ad hoc *announcement pursuant to Art. 53 LR*".
- All other announcements, for example those that have a purely marketing character, must not be published by means of an ad hoc announcement. This approach is intended to avoid confusion in the market.
- The Issuers Committee Circular No. 1 of March 10, 2021 expressly cautions issuers against **misusing ad hoc disclosure for marketing purposes**. Abuses will be sanctioned. Good faith caution in the determination of what constitutes a price-sensitive fact should in our view not constitute the type of abuses that the circular warns against.
- The revised Directive on Ad hoc Publicity further details the duties of the issuer with respect to the publication of announcements on its **website**: Ad hoc announcements must be made available on the issuer's website in chronological order (with the date of distribution indicated) in a directory that is easy to find for at least three years (instead of two years). An appropriate reference must be made to the classification of the announcements as "Ad hoc *announcements pursuant to Art. 53 LR*".

[1] A reasonable market participant is not necessarily a professional investor.

3 Postponement of disclosure

MAR tightly regulates the conditions under which disclosure of price-sensitive information may be delayed and the process to be followed by issuers when they do so. The new rules coopt some of the features of MAR:

- As under the current regime, an issuer will be permitted to postpone the disclosure of price-sensitive information if it is based on a plan or decision of the issuer (such as a proposed M&A transaction), and if dissemination might prejudice the issuer's legitimate interests. In such a case, the issuer must ensure the confidentiality of non-disclosed price-sensitive facts.
- The revised rules will explicitly impose on the issuer the duty to maintain such confidentiality by implementing **adequate and transparent internal rules or processes** in line with the latest developments and best practice with regard to safeguarding confidentiality. In particular, the issuer will be required to take organizational measures to ensure that confidential facts are only disclosed on a need-to-know basis. The issuer is free to choose which rules or processes it will adopt.
- According to the Issuers Committee Circular No. 1 of March 10, 2021, **best practice** may encompass, among other things: (i) sharing confidential information with the smallest number of persons possible (need-to-know principle), (ii) limiting and safeguarding access to such information (e.g., through the introduction of Chinese walls), (iii) obtaining non-disclosure declarations from all persons who are aware of such information, and (iv) maintaining insider lists (while for the EU market, MAR prescribes the required content of insider lists and ESMA has issued two mandatory templates, SIX-listed companies are free to individually define the type, format and content of lists most appropriate for them).
- These precautionary measures are intended to minimize the risks of leaks and insider trading. Insider lists may also facilitate the prosecution of insider trading activities, a particularly sensitive topic around M&A transactions, which typically require to bring a large number of people "over the wall", including employees, advisors, and financing sources.

Unlike under MAR, SIX-listed issuers are not required to inform, following the ad hoc publication, SIX Exchange Regulation or any regulator such as FINMA that disclosure was delayed.

4 Mandatory transmission via CONNEXOR Reporting

For reasons of security and confidentiality, from October 1, 2021 **issuers of primary-listed equity securities** must use the online platform CONNEXOR Reporting for transmission of their ad hoc announcements to SIX Exchange Regulation.

Other issuers, i.e., issuers of derivatives, bonds, conversion rights, collective investment schemes and secondary-listed equity securities, may **continue** to submit ad hoc announcements to SIX Exchange Regulation by e-mail.

Issuers will enjoy greater discretion to assess price-sensitivity (no per se facts other than periodic reports).

5 Corporate governance report: quiet periods

Under the revised SIX Directive on Information Relating to Corporate Governance, an issuer will have to publish retrospective information on quiet periods in the Corporate Governance Report. Such information covers for example deadlines, recipients, scope of, and exceptions to, the quiet periods.

As for all other information prescribed to be contained in the Corporate Governance Report, the "*comply or explain*" format applies. This means that an issuer may refrain from disclosing information on general quiet periods. If so, a specific reference and the grounds for such non-disclosure must be included in the Corporate Governance Report.

6 Links to revised SIX listing rules and related guidance

Relevant information is available on the following links:

- SIX Listing Rules
- SIX Directive on Ad Hoc Publicity
- SIX Issuers Committee Circular No. 1
- SIX Directive on Information Relating to Corporate Governance

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