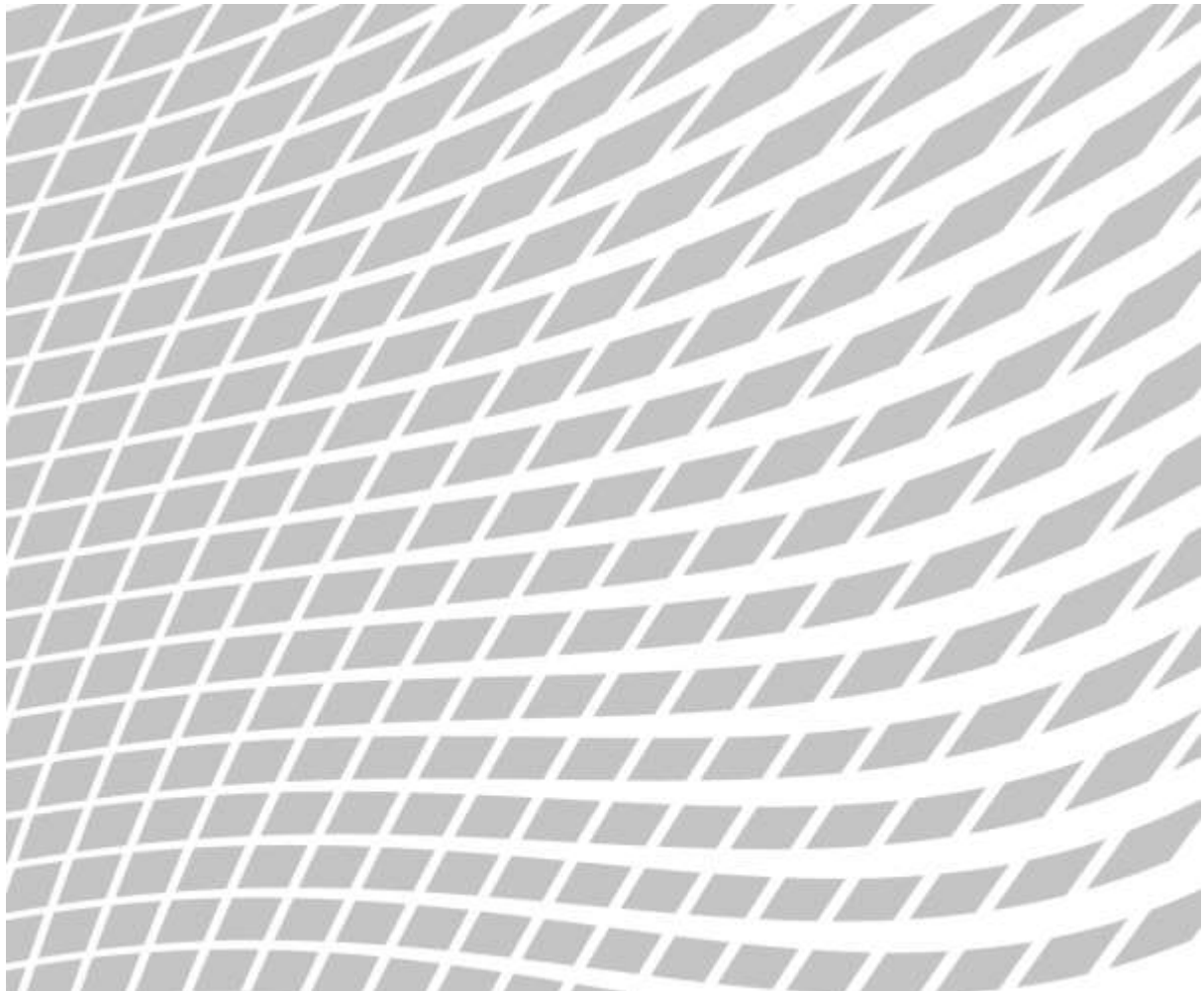


22 August 2016

FINMA Financial Market Infrastructure Ordinance

Key points



1. The Financial Market Infrastructure Act (FMIA), which came into force on 1 January 2016, contains an updated notification duty for qualified participations in listed companies. In addition to the beneficial owner of any such participation, third parties who have the discretionary power to exercise the associated voting rights are also subject to the notification duty (Art. 120 FMIA). This is the case, for example, when beneficial owners give their asset manager power of attorney to exercise the voting rights associated with a qualified participation at the general meeting of shareholders at the asset manager's own discretion.
2. FMIO-FINMA sets out specific details of this new notification duty. The original intention was for the notification duty to apply to any party authorised to decide on how voting rights are exercised without requiring instructions, i.e. at their own discretion. This was to ensure in particular that asset managers with the discretionary power to exercise the voting rights associated with the beneficial owner's qualified participation were subject to the notification duty. Restricting the notification duty to the party actually entrusted with the voting rights seemed sufficient from a legal viewpoint, and it was hoped that this would make compliance easier for those affected. In the consultation, however, most were critical of this proposal and requested that, as is the case with the beneficial owner, the notification duty should apply to the "last link in the chain". In other words, if the asset manager with the discretionary power to exercise the voting rights is a legal entity controlled by an individual, that controlling individual should be subject to the notification duty, regardless of whether or not the individual actually intends to influence how the voting rights are exercised. The reason cited for wanting this specified is that it makes the notification duty for third parties with discretionary power to exercise voting rights consistent with that for the beneficial owner. There thus appeared to be no justification for keeping the originally proposed wording against the will of those affected by it. The version that finally came into force on 1 January 2016 takes this into account in that anyone who controls a legal entity either directly or indirectly is deemed to have the discretionary power to exercise voting rights (Art. 10 para. 2 sentence 3 FMIO-FINMA).
3. Since this rule came into force on 1 January 2016, various stakeholders affected by it have reported problems with its implementation. They claim in particular that it is very laborious in the case of individuals who control financial groups but do not perform any operating function. The wording that is currently applicable was intended to take the concerns of those affected into account. It would appear that this goal was not met. With this in mind, the proposal put forward here is to reinstate the original wording whereby the party that actually has the discretionary power to exercise voting rights is the one subject to the notification duty.