



# Publication of BaFin's updated issuer guidelines

The German Federal Financial Services Supervisory Authority (BaFin) published on 20 May 2009 a new version of its issuer guidelines. This new version contains updated and extended explanatory notes, especially on the notification requirements regarding voting rights in listed issuers, on the ad hoc disclosure obligations and the disclosure requirements on directors' dealings under the German Securities Trading Act (WpHG).

## Notification requirements regarding major holdings of voting rights

The explanatory notes on the notification requirements regarding major holdings of voting rights in listed issuers reflect the amendments of the German Securities Trading Act (WpHG), which occurred because of the implementation of the Transparency Directive and further statutory reforms. In particular, this concerns the provision on acting in concert, tightened notification requirements regarding financial instruments that result in an entitlement to acquire shares of listed issuers and the additional disclosure obligations of owners of major holdings of voting rights amounting to 10 per cent or more.

BaFin now confirms that an abstract approach applies for both the number of voting rights attributed to the person subject to notification requirements and the total number of the underlying voting rights in the listed issuer. For the attribution of voting rights it is irrelevant whether these voting rights can be exercised in specific individual cases. Also the issuer's own shares are to be considered in the total number of the underlying voting rights. In addition, concerning the total number of voting rights, BaFin points out that persons obliged to make a notification of their voting rights cannot in each case rely on the last monthly publication of the total number. If the person is aware or should have been aware of any change since the last monthly publication, the current total number of voting rights alone is relevant. Moreover, BaFin confirmed that an issuer's change of corporate form does not itself cause notification requirements,

because no relevant threshold is affected. This is particularly welcome because there was uncertainty in this respect due to court judgments. According to BaFin, there is also no notification obligation in the case of a simple change in the composition of a share of voting rights that is otherwise unchanged – for instance, if voting rights that were previously attributed to a person are now held directly by such person.

The issuer guidelines finally comprehensively outline the notification requirements for major holdings of voting rights in connection with investment companies and management companies in third countries either in or outside the EU/EEA. In particular, they offer valuable help in resolving the complex attribution questions that can arise in these cases.

## Notification requirements for financial instruments and derivatives

Notification requirements can also arise with regard to holdings of financial instruments that grant the owner the right to acquire shares of listed issuers. In this area, it is of particular practical relevance that in contrast to its original considerations in the preceding consultation procedure, BaFin confirms its previous administrative practice that claims for the delivery of shares arising under securities loans and repo agreements do not cause notification requirements.

Also, in BaFin's opinion, cash-settled derivatives, such as total return equity swaps or cash-settled call options, do not cause a notification requirement, which confirms the predominant view in legal literature.

### Ad hoc disclosure

Alongside a detailed explanation of the term ‘domestic issuer’, which became extremely complex in the course of the implementation of the Transparency Directive, the issuer guidelines now contain detailed explanations of BaFin’s understanding of the term ‘inside information’. Thus BaFin clarifies that an issuer that has not published a forecast for interim results of operations may be obliged to publish an ad hoc disclosure if its results of operations:

- clearly deviate from the corresponding figures for the previous year;
- represent a break compared with the previous business development; or
- clearly differ from the market expectation.

If the issuer has published a forecast for its annual results of operations, the aforementioned disclosure requirement may also apply if the issuer does not change its original forecast regardless of the unexpected interim results of operations.

With regard to any future-related circumstances, which have always been recognised as potential inside information subject to disclosure requirements, BaFin has specified the requirements of the probability that triggers the disclosure requirement. A sufficient probability is deemed to exist if it is higher than 50 per cent.

BaFin has confirmed its opinion that the exemption option, which would justify the postponement of an ad hoc disclosure, requires an explicit decision to this purpose. The explanations are of particular relevance against the backdrop of current court judgments. The exemption option is of importance in the case of ongoing transactions or for decision-making processes involving multiple layers of hierarchy. According to BaFin, at least one member of the issuer’s management board must be involved in taking the decision on the postponement of an ad hoc disclosure.

The issuer may use the exemption option only if the postponement of the ad hoc disclosure does not adversely affect the public. In particular, this means that during the exemption period no signals that are contrary to the not-yet-published inside information may be sent by the issuer. In this regard, it is welcome that BaFin

confirms the standpoint that following a ‘no comment policy’ is not to be regarded as a misleading signal.

### Directors’ dealings

In its explanatory notes on the requirement to publish so-called directors’ dealings, BaFin confirms its perception that the relevant statutory provision is to be restrictively interpreted in cases of transactions by legal entities. Consequently, the intent and purpose of the provision should be taken into account, so that only those transactions that could directly or indirectly ensure a noteworthy economic advantage for the relevant director would fall under the provision.

The issuer guidelines are available on BaFin’s website: [www.bafin.de](http://www.bafin.de).

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