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**Ordinance
of the Swiss Financial Market Supervisory Authority
on Financial Market Infrastructures and Market Conduct
in Securities and Derivatives Trading
(FINMA Financial Market Infrastructure Ordinance, FMIO-FINMA)**

of 3 December 2015 (Status as of 1 March 2017)

The Swiss Financial Market Supervisory Authority (FINMA),

based on Article 15 paragraph 3 of the Stock Exchange Act of 24 March 1995¹ (SESTA),

Article 30 paragraph 4 of the Stock Exchange Ordinance of 2 December 1996² (SESTO),

Articles 38, 39 paragraph 2, 101 paragraphs 1 and 2, 123 paragraphs 1 and 2 and 135 paragraph 4 of the Financial Market Infrastructure Act of 19 June 2015³ (FMIA),

and Article 36 paragraph 4 of the Financial Market Infrastructure Ordinance of 25 November 2015⁴ (FMIO),

hereby decrees:

Chapter 1 Record-Keeping and Documenting Requirements

(Art. 38 FMIA; Art. 15 SESTA)

Art. 1

¹ Securities dealers⁵ under SESTA and participants⁶ in an approved trading venue note the orders and transactions which must be recorded under Article 30 SESTO and Article 36 FMIO in a ledger or journals, regardless of whether the securities or derivatives are traded at the trading venue.

² The following shall be recorded in the ledger for all received orders:

- a. the name of the securities and derivatives;

AS 2015 5509

¹ SR 954.1

² SR 954.11

³ SR 958.1

⁴ SR 958.11

⁵ As most *securities dealers* are legal entities, gender-neutral terminology is not used in this text.

⁶ As most *participants* are legal entities, gender-neutral terminology is not used in this text.

- b. the time the order was received;
- c. the name of the person placing the order;
- d. the name of the transaction and order type;
- e. the scope of the order.

³ The following shall be recorded in the ledger for completed transactions:

- a. the time of execution;
- b. the scope of the execution;
- c. the attained or allocated price;
- d. the place of execution;
- e. the name of the counterparty;
- f. the value date.

⁴ The received orders and completed transactions, regardless of whether they are subject to the reporting duty outlined in Chapter 2, are to be designated in a standardised format, so that the information can be delivered to FINMA promptly and in its entirety on request.

Chapter 2 Duty to Report

(Art. 39 FMIA; Art. 15 SESTA)

Art. 2 Transactions to be reported

The securities dealers under SESTA and participants admitted to a trading venue must report all transactions under Article 31 SESTA and Article 37 FMIO to the addressee under Article 5.

Art. 3 Contents of the report made

The report made shall contain the following details:

- a. the name of the securities dealer tasked with forwarding the report under SESTA or the participant admitted to a trading venue;
- b. the transaction type (buy/sell);
- c. the exact name of the securities or derivatives in question;
- d. the scope of the transaction as follows: nominal amount for bonds, units or contracts for other securities and derivatives;
- e. the price;
- f. the date and time of execution;
- g. the value date;
- h. whether it is a proprietary or client transaction;

- i. the name of the counterparty as a stock exchange member, other securities trader, customer; for forwarding orders: the principal;
- j. the name of the trading venue where the securities or derivative were traded, or notification that the transaction was made outside a trading venue;
- k. for client transactions: a standard reference enabling identification of the beneficial owner of the transaction (Art. 37 para. 1 let. d FMIO and Art. 31 para. 1 let. d SESTO).

Art. 4 Reporting period

Transactions are to be reported within the periods outlined in the regulations of the trading venue to which the report is addressed.

Art. 5 Report addressee

¹ Securities transactions must be reported to the trading venue where the securities are admitted for trading.

² If a security is admitted for trading at more than one trading venue in Switzerland licensed by FINMA, the reporting parties may choose at which trading venue to fulfil their reporting obligations.

³ The derivatives transactions under Article 31 paragraph 2 SESTO and Article 37 paragraph 2 FMIO must be reported at the trading venue where the underlying is admitted for trading. If the derivative has a number of securities as underlyings, the report may be provided to the trading venue where one of the underlyings is admitted for trading.

⁴ Trading venues have a dedicated office (disclosure office) in their organisation for receiving and processing reports.

⁵ The disclosure office has regulations. It may request adequate compensation for any duties commissioned by FINMA. The prices are provided to FINMA for approval.

Chapter 3 OTC Derivatives Transactions for Clearing

(Art. 101 FMIA)

Art. 6 Principle

¹ The derivatives categories cleared via a central counterparty are listed in Annex 1.

² The decision whether to list a derivatives category in Annex 1 is based on whether:

- a. the contract conditions contain the usual legal documents for the sector with the usual contract specifications listed by counterparties;
- b. the operational processes are subject to automated post-trade processing and there are standard lifecycle events managed according to a generally agreed schedule;

- c. the margin or financial requirements of the central counterparty are adequately proportionate to the risk being mitigated by the obligatory clearing;
- d. the size and depth of the market are stable over the long term relative to the product;
- e. if a participant in a central counterparty defaults, the market segmentation remains sufficient;
- f. the number and value of the previously concluded transactions are sufficiently high;
- g. the information required to define the price is readily available under normal trading conditions;
- h. there is a heightened systemic risk that counterparties may be unable to meet their payment and delivery obligations to each other if there are strong interdependencies between them.

Art. 7 Determination of the OTC derivatives for clearing

¹ When licensing a Swiss central counterparty or recognising a foreign central counterparty, FINMA determines which of the derivatives cleared by the central counterparty are mandated for clearing. The central counterparty shall take into consideration the criteria under Article 6 paragraph 2 and international standards when determining its clearing duty.

² If the central counterparty clears additional derivatives categories subsequently to obtaining a licence or recognition, it shall inform FINMA accordingly.

³ It must deliver all information to FINMA required to determine the derivatives categories for clearing on request.

Chapter 4

Correspondence and Determination of Deadlines in relation to the Disclosure of Shareholdings and Takeovers

Art. 8 Correspondence
(Art. 123 para. 1, 139 para. 5 FMIA)

¹ Notifications and submissions sent by fax or e-mail pertaining to the disclosure of shareholdings and takeovers are admitted through correspondence outside the scope of administrative proceedings and recognised for the purpose of adhering to deadlines.

² Recommendations by the disclosure offices are normally made to the parties, applicants and FINMA by fax or e-mail.

³ The ordinance of 18 June 2010⁷ governing electronic transmission within the administrative process applies to electronic submissions as part of the administrative process. Submissions to the Takeover Board may also be made by fax.

Art. 9 Determination of deadlines

(Art. 123 para. 1 FMIA)

¹ Any time frame calculated by trading days starts on the first trading day following the trigger event.

² Any time frame calculated by weeks ends in the last week on the same day as the day on which the trigger event took place. If this day is not a trading day, the deadline is on the next trading day.

³ Any time frame calculated by months ends in the last month on the same date as the date on which the trigger event took place. If this date does not fall during that month, the deadline ends on the last day of the last month; if the day is not a trading day, the deadline ends on the next trading day.

⁴ Trading days are those days on which the relevant stock exchange in Switzerland is open for trading according to its trading calendar.

Chapter 5 Disclosure of Shareholdings

Section 1 Notification Duty

Art. 10 Principles

(Art. 120 paras. 1 and 3, 123 para. 1 FMIA)

¹ The beneficial owners of equity securities under Article 120 paragraph 1 FMIA are subject to the notification duty. A beneficial owner is the party controlling the voting rights stemming from a shareholding and bearing the associated economic risk.

² If the voting rights are not exercised directly or indirectly by the beneficial owner, anyone who has full discretionary powers to exercise voting rights is subject to notification duty in accordance with Article 120 para. 3 FMIA. If the person who has full discretionary powers to exercise voting rights is directly or indirectly controlled, their notification duty is met where the controlling person reports on a consolidated basis. The controlling person is then considered to be subject to notification duty.⁸

³ There is no notification duty, if:

- a. notification has been provided of reaching a threshold and that value is exceeded, without the next threshold having been reached or exceeded;

⁷ SR 172.021.2

⁸ Amended by No I of the FINMA Ordinance of 26 Jan. 2017, in force since 1 March 2017 (AS 2017 547).

- b. notification has been provided of a threshold having been reached or exceeded, the value then falls back down to again reach the threshold, without the next threshold above having been reached or exceeded;
- c. a threshold is temporarily achieved, exceeded or fallen below during a trading day.

Art. 11 Indirect acquisition and indirect sale

(Art. 120 para. 5, 123 para. 1 FMIA)

The following qualify as an indirect acquisition or indirect sale of a shareholding:

- a. the acquisition and sale via a third party acting under its own name and trading for the account of the beneficial owner;
- b. the acquisition and sale through directly or indirectly controlled legal entities;
- c. the acquisition and sale of a shareholding which directly or indirectly transfers ownership of a legal entity which also has direct or indirect ownership of equity securities.

Art. 12 Trading in concert or as an organised group

(Art. 120 para. 1, 121, 123 para. 1 FMIA)

¹ Any party whose conduct regarding the acquisition or sale of shareholdings or exercising of voting rights with third parties by contract or other organised procedure or by law, is acting in concert or as an organised group.

² Purchasing and selling between persons who are connected with each other and have reported their full shareholding, are exempt from the notification duty.

³ Changes in the composition of the group and the nature of the arrangement or group, on the other hand, must be reported.

Art. 13 Emergence of the notification duty

(Art. 120 paras. 1, 3 and 4, 123 para. 1 FMIA)

¹ The notification duty under Article 120 paragraph 1 FMIA arises with the justification of the claim to acquire or sell equity securities (binding transaction), irrespective of whether this claim is conditional. The indication of an intended purchase or sale does not entail any notification requirement, provided there are no legal obligations involved.

² The occurrence of a reporting obligation at the time of the binding transaction under paragraph 1 and the associated loss of beneficial owner status and voting entitlement, do not entail a separate reporting obligation under Article 120 paragraph 3 FMIA either for the buyer or seller.

³ There is a reporting obligation incumbent on companies with a registered office in Switzerland including a notice in the Swiss Official Gazette of Commerce on reaching, exceeding or falling short of a threshold following an increase, decrease or restructuring of its share capital. Companies with a registered office outside Switzer-

land whose equity securities are listed in whole or in part in Switzerland are subject to the notification duty at the time of publication under Article 115 paragraph 3 FMIO.

Art. 14 Calculation of the positions requiring notification

(Art. 120 paras. 1 and 3, 123 para. 1 FMIA)

¹ Whoever reaches, exceeds or falls short of a threshold in one or both of the positions below, must calculate the positions individually and separately of each other and report them both simultaneously:

- a. purchasing positions:
 1. equities and equity-related units and voting rights under Article 120 paragraph 3 FMIA,
 2. conversion and acquisition rights (Art. 15 para. 2 let. a),
 3. granted (written) sales rights (Art. 15 para. 2 let. b),
 4. other equity derivatives (Art. 15 para. 2);
- b. sale positions:
 1. sales rights (Art. 15 para. 2 let. a),
 2. granted (written) conversion and acquisition rights (Art. 15 para. 2 let. b),
 3. other equity derivatives (Art. 15 para. 2).

² The positions requiring notification are to be calculated for companies with a registered office in Switzerland based on the total number of voting rights in accordance with the entry in the commercial register. The calculation of the positions requiring notification for companies having their registered office abroad is regulated by Article 115 paragraph 3 FMIO.

Art. 15 Equity derivatives

(Art. 120 paras. 1, 4 and 5, 123 para. 1 FMIA)

¹ Equity derivatives for the purpose of this Ordinance are instruments whose value is derived, at least partially, from the value or performance of equity securities of companies under Article 120 para. 1 FMIA.

² The following need to be reported:

- a. the purchase or sale of convertible and acquisition rights, particularly call options, and of sale rights, particularly put options which are designed for or permit actual delivery;
- b. the granting (writing) of convertible and acquisition rights, particularly call options, and of sale rights, particularly put options which are designed for or permit actual delivery; and
- c. equity derivatives designed for or permitting cash settlement as well as other difference transactions including *contracts for difference*, *financial futures*.

³ The exercise or non-exercise of equity derivatives reported under paragraph 2 must be reported again if it leads to one of the thresholds under Article 120 paragraph 1 FMIA being reached, exceeded or undershot.

Art. 16 Other facts requiring notification

(Art. 120 paras. 1 and 4, 123 para. 1 FMIA)

¹ A reporting requirement applies in particular when one of the thresholds under Article 120 paragraph 1 FMIA is achieved, exceeded or undershot:

- a. due to an increase, decrease or restructuring of share capital;
- b. for the acquisition or sale of proprietary equity securities through a company;
- c. for the acquisition and sale of equity securities for in-house funds in accordance with Article 4 of the Collective Investment Schemes Act (CISA) of 23 June 2006⁹;
- d. through the proportion of voting rights in the acquisition positions in accordance with Article 14 paragraph 1 letter a 1, alone, whether exercisable or not and regardless of whether the total voting share reaches, exceeds or undershoots a threshold taking into account the equity derivatives under Article 15;
- e. when transferring equity securities for legal reasons or following a court or authority ruling.

² Changes in information under Article 22 paragraphs 1 letters d and e, 2 letters c, d and f and 3 now also entail obligatory notification.

Art. 17 Securities lending and similar transactions

(Art. 120 para. 1, 123 para. 1 FMIA)

¹ Lending transactions and similar transactions, particularly the sale of repo transactions or security transfers including transfer of ownership must be reported.

² The reporting obligation is only incumbent on the contracting party acquiring temporary ownership of the securities through such transactions:

- a. for lending transactions: the borrower;
- b. for repo transactions: the buyer; and
- c. for security transfers: the acquirer of the security.

³ On expiry of the transaction, the returning contracting party under paragraph 2 is again subject to a notification duty on reaching or falling below a threshold under Article 120 paragraph 1 FMIA.

⁴ Lending and repo transactions do not need to be reported if they are processed in standard format via trading platforms for liquidity management.

Art. 18 Collective investment schemes

(Art. 120 para. 1, 121, 123 para. 1 FMIA)

¹ The reporting obligations under Article 120 paragraph 1 FMIA apply for shareholdings in approved collective investment schemes under CISA¹⁰ and must be met by the licence holder¹¹ (Art. 13 para. 2 let. a–d CISA and Art. 15 in conjunction with Art. 120 para. 1 CISA).

² Fulfilling the reporting requirement involves:

- a. Reporting requirements for more than one collective investment scheme of the same licence holder are to be fulfilled comprehensively (i.e. including all investment schemes) and for each collective investment if they individually reach, exceed or fall below thresholds.
- b. There is no obligatory consolidation with the group for fund management companies within a group.
- c. The fund management company is obliged to meet reporting requirements for investment companies with variable capital (SICAV).
- d. Each sub-fund of an open-ended collective capital investment with sub-funds qualifies as an individual collective capital investment within the meaning of paragraph 1.

³ For foreign collective capital investment schemes not approved for sale which do not depend on a group, the reporting requirements in Article 120 paragraph 1 FMIA are to be met by the fund management company or company. Paragraph 2 applies to fulfilling the reporting requirement.

⁴ For foreign collective capital investment schemes not approved for sale which depend on a group, the reporting requirements in Article 120 paragraph 1 FMIA are met by the group.

⁵ The independence of the fund management company or company is contingent on the following:

- a. *personal independence*: Persons controlling the exercising of the voting right for the fund management company or company act independently of the group parent company and those companies under its control;
- b. *organisational independence*: The group ensures the following through its organisational structures:
 1. the group parent company and other companies under its control have no influence over the fund management company or company's voting rights either through regulation or by any other method, and
 2. no information is exchanged or disseminated between the fund management company or company and group parent company or other companies under its control which could influence the exercising of the voting rights.

¹⁰ SR 951.31

¹¹ As most *licence holders* are companies, gender-neutral terminology is not used in this text.

⁶ The group must provide the relevant disclosure office with the following documents for those cases under paragraph 3:

- a. a list with the names of the fund management companies or companies;
- b. an explanation as to how the independence requirements in paragraphs 3 and 5 are fulfilled and maintained.

⁷ The group must provide the relevant disclosure office with details of every change to the list under paragraph 6 letter a.

⁸ For those cases under paragraph 3, the relevant disclosure office may request further documentation supporting the fulfilment and maintenance of the independence conditions at any time.

⁹ Details of the investor's identity are not required.

Art. 19 Banks and securities dealers

(Art. 123 para. 2 FMIA)

¹ When calculating their acquisition positions (Art. 14 para. 1 let. a) and sale positions (Art. 14 para. 1 let. b) banks and securities dealers may not, under SESTA, factor in equity securities and equity derivatives which they hold:

- a. in their trading portfolio, provided their share does not reach 5% of voting rights;
- b. as part of security loans, security transfers or repo transactions provided their share does not reach 5% of voting rights;
- c. only for up to two trading days and exclusively for invoicing or processing transactions.

² The calculation under paragraph 1 is only authorised provided there is no intention to exercise the voting rights for these units or to influence the issuer's¹² business conduct in any other way, and the voting share does not exceed 10% of the voting rights.

³ Equity securities for in-house funds under Article 4 CISA¹³ are to be counted with the bank's or security dealer's proprietary holdings.

Art. 20 Takeover procedure

(Art. 123 para. 1 FMIA)

¹ The reporting obligations of the Takeover Board based on Article 134 paragraph 5 FMIA apply exclusively to the following persons from the publishing of the prior notice on the takeover offer or the prospectus for this offer (offer prospectus) to the end of the extension period:

- a. the provider¹⁴;
- b. persons acting in concert or as an organised group with the provider;

¹² As most *issuers* are legal entities, gender-neutral terminology is not used in this text.

¹³ SR 951.31

¹⁴ As most *providers* are legal entities, gender-neutral terminology is not used in this text.

- c. Persons under Article 134 paragraph 1 FMIA holding at least 3% of voting rights directly, indirectly or in concert with third parties, whether exercisable or not, in the target company or, if applicable, in another company whose equity securities are being offered in exchange;
- d. Persons named by the Takeover Board in accordance with Article 134 paragraph 3 FMIA.

² Cases requiring notification which occurred during the takeover process must be reported after expiry of the extension period in accordance with the provisions of this Ordinance.

³ Paragraphs 1 and 2 are not relevant to the repurchase of proprietary equity securities.

Art. 21 Preliminary ruling
(Art. 123 paras. 1 and 3 FMIA)

¹ Requests for a preliminary ruling regarding the applicability or otherwise of a reporting requirement must be submitted to the relevant disclosure office prior to performance of the transaction.

² The disclosure office may intervene in requests for concluded transactions as an exception.

Section 2 Notification and Publication

Art. 22 Contents of the notification
(Art. 123 para. 1 FMIA)

¹ The notification contains the following details:

- a. The share of voting rights, type and number of all equity securities held by the persons involved or equity derivatives under Article 15 and the associated voting rights. If the share falls below the 3% threshold, the notification to that effect may be given without specifying the actual voting share;
- b. duty to provide notification of the underlying circumstances, for example:
 1. acquisition,
 2. sale,
 3. transfer of voting rights with full discretionary power (Art. 120 para. 3 FMIA),
 4. exercising or non-exercising of equity derivatives under Article 15,
 5. securities lending and similar transactions under Article 17,
 6. change in share capital,
 7. court or authority ruling,
 8. establishing of a joint arrangement,
 9. change in the composition of a group, or
 10. change in registered details;

- c. emergence date of notification duty;
- d. transfer date of the equity securities, if different to the notification duty emergence date;
- e. last name, first name and place of residence or company and registered office of the acquiring, selling or associated persons.

² The information in paragraph 1 is to be given with the details below in the following instances:

- a.¹⁵ in the cases outlined in Article 120 paragraph 3 FMIA:
 - 1. the proportion of voting rights vested in the notification regarding the person with full discretionary powers over the exercise of the voting rights,
 - 2. any indication where the notification duty is not exercised by the person with full discretionary powers to exercise voting rights, rather the person who directly or indirectly controls the person with full discretionary powers to exercise voting rights (case of consolidated reporting);
- b. when acting in concert or as an organised group under Article 12: the details under Article 121 FMIA and Article 12 paragraph 3 of this Ordinance;
- c. for equity derivatives under Article 15 with an International Securities Identification Number (ISIN): this number;
- d. for equity derivatives under Article 15, without an ISIN: the basic details, including:
 - 1. the identity of the issuer,
 - 2. the underlying value,
 - 3. the subscription ratio,
 - 4. the strike price,
 - 5. the exercise period,
 - 6. the exercise type;
- e. for collective investments under Article 18 paragraph 3: confirmation that the requirements under Article 18 paragraph 4 have been met;
- f. for legal transactions under Article 17:
 - 1. the voting share, type and number of transferred equity securities or equity derivatives under Article 15 and the associated voting rights,
 - 2. the nature of the legal transaction,
 - 3. the agreed time of return or, if a voting right has been granted for this purpose, whether it is allocated to the contracting party bearing the duty of notification under Article 17 paragraph 2 or the counterparty.

¹⁵ Amended by No I of the FINMA Ordinance of 26 Jan. 2017, in force since 1 March 2017 (AS 2017 547).

³ In the event of the indirect acquisition or indirect sale (Art. 11) the notification must contain the full details of both the person making the direct acquisition or sale and of the beneficial owner.

Art. 23 Supplementary details

(Art. 123 para. 1 FMIA)

Every notification to the disclosure office and company must include details of a contact person including their last name, first name, address, telephone number and e-mail.

Art. 24 Notification periods

(Art. 123 para. 1 FMIA)

¹ The notification must be received by the company and relevant disclosure office within four trading days following the emergence of the notification duty. The disclosure office shall supply the requisite forms.

² In the event of acquisition through inheritance, the period under paragraph 1 is twenty trading days.

³ The company must disclose the notification within two trading days of receiving it.

⁴ For transactions in proprietary securities, the company must provide notification to the relevant disclosure office and publish the notification within four trading days following the emergence of the notification duty.

Art. 25 Publication

(Art. 123 para. 1, 124 FMIA)

¹ The company publishes the notification in accordance with Article 22 via the electronic publishing platform of the relevant disclosure office. It must also refer to the previous disclosure by the same person with responsibility to provide notification.

² If a company fails to provide notification or if it provides incomplete or erroneous notification, the disclosure offices may still proceed with publication of the necessary information and invoice the company for the costs incurred through the substitute measure. The disclosure offices may publish the reasons for the substitute measure. The company must be informed in advance.

Art. 26 Exemptions and easing provisions

(Art. 123 paras. 1 and 2, 124 FMIA)

¹ Exemptions or easing provisions to the duty of notification and disclosure may be granted, provided there is good cause for doing so, and particularly if the transactions are:

- a. short-term in nature;
- b. do not entail any intention to exercise the voting right; or
- c. come with conditions.

² Requests to this effect must be made to the relevant disclosure office prior to the transaction in question.

³ Requests for completed transactions shall only be granted by the relevant disclosure office as an exception and in extraordinary circumstances.

Section 3 Monitoring

Art. 27 Disclosure office

(Art. 123, 124 FMIA)

¹ Stock exchanges have a dedicated office (disclosure office) for monitoring the duty of notification and disclosure. The disclosure office also processes requests for a preliminary ruling (Art. 21) and for exceptions and easing provisions (Art. 26).

² If the establishment of such an office proves excessive, this role may be transferred to another stock exchange; the regulations governing the cooperation must be submitted to FINMA for approval.

³ The disclosure offices keep the public informed of their activities. They may issue announcements and regulations and publish information required to fulfil their business purpose in an appropriate format. As a rule, recommendations are published in anonymous form.

⁴ The disclosure offices may request adequate compensation for any duties commissioned by FINMA and for processing requests. The prices must be provided to FINMA for approval.

Art. 28 Procedure

(Art. 123, 124 FMIA)

¹ Requests for a preliminary ruling (Art. 21) and for exemptions or easing provisions (Art. 26) must contain a statement of the facts, an application and justification. The statement of the facts must be accompanied by the appropriate documentation and include all the details outlined under Article 22.

² The disclosure office issues recommendations for applicants; these must be justified and communicated to FINMA.

³ The disclosure office may issue its recommendations to the company. Fundamental interests of the applicant, i.e. business secrets are reserved.

⁴ FINMA issues a decision, when:

- a. it wishes to rule on the matter itself;
- b. the applicant rejects or fails to observe the recommendation; or
- c. the disclosure office approaches it for a decision.

⁵ If FINMA wishes to decide on the matter itself, it shall make its intentions known within five trading days.

⁶ A rejected recommendation must be justified by the applicant in a submission to FINMA within five trading days. FINMA may extend this deadline on request.

⁷ For those cases under paragraph 4, FINMA shall immediately initiate proceedings and inform the disclosure office and parties to that effect. It shall also instruct the disclosure office to submit its files.

Art. 29 Investigations
(Art. 8, 31, 123 para. 1 FMIA)

FINMA may instruct the disclosure offices to conduct investigations.

Chapter 6 **Duty to make an Offer**
Section 1 **Duty to make an Offer**

Art. 30 Applicable provisions
(Art. 135 para. 4 FMIA)

In addition to Art. 135 FMIA and the following provisions, Articles 125–134, 136–141, 152 and 163 FMIA and the implementing provisions of the Federal Council and Takeover Board pertaining to public takeover offers apply to the duty to make an offer.

Art. 31 Principle
(Art. 135 paras. 1 and 4 FMIA)

The duty to make an offer is incumbent on anyone who acquires equity securities directly or indirectly and, by doing so, exceeds the legal or statutory threshold under Article 135 paragraph 1 FMIA (threshold).

Art. 32 Indirect acquisition
(Art. 135 paras. 1 and 4 FMIA)

Article 120 paragraph 5 FMIA and Article 11 of this Ordinance apply by analogy to those participations of the target company requiring an offer when making an indirect acquisition.

Art. 33 Trading in concert or as an organised group
(Art. 135 paras. 1 and 4, 136 para. 2 FMIA)

Article 12 paragraph 1 applies to persons acting in concert or as an organised group to acquire participations requiring an offer in the target company with a view to taking over the target company.

Art. 34 Calculation of the threshold
(Art. 135 paras. 1 and 4 FMIA)

¹ The threshold is based on the total number of voting rights in accordance with the entry in the commercial register.

² When determining whether the threshold has been exceeded, all equity securities are taken into account which are owned by the acquiring person or whose voting rights have been transferred to the acquiring person in another way, regardless of whether the voting rights may be exercised.

³ Voting rights restricted to power of representation at a General Meeting are excluded from the calculation.

Art. 35 Definition of the duty to make an offer

(Art. 135 paras. 1 and 4 FMIA)

¹ The duty to make an offer must be extended to all types of listed equity securities of the target company.

² It must also include new equity securities created through equity derivatives, if the associated rights are exercised prior to expiry of the extension under Article 130 paragraph 2 FMIA.

Art. 36 Transfer of the duty to make an offer to the acquiring person

(Art. 135 para. 4, 136 para. 2, 163 FMIA)

If the person who previously had the rights to the equity securities under the transitional regulation of Article 163 FMIA, was subject to the duty to make an offer for all equity securities on exceeding the threshold of 50% of voting rights, this duty transfers to the person acquiring between 33½ and 50% of the voting rights, if the person is exempted from the duty to make an offer under Article 136 paragraph 2 FMIA.

Art. 37 Return of the duty to make an offer

(Art. 135 para. 4 FMIA)

A person who reduces a proprietary share of 50% or more of the voting rights in a company acquired prior to 1 January 1998 to under 50%, must make an offer under Article 135 FMIA, if said person's share subsequently returns to above 50%.

Art. 38 Duty to make an offer and conditions

(Art. 135 paras. 1 and 4, 136 para. 2 FMIA)

¹ The duty to make an offer cannot be attached to conditions unless there is good cause for doing so.

² Good cause applies in particular if:

- a. official authorisation is required for an acquisition;
- b. the equity securities in question do not include any voting entitlement; or
- c. the provider wants the specific nature of the target company's economic substance to remain unchanged.

Art. 39 Period

(Art. 135 paras. 1 and 4 FMIA)

- ¹ The obligatory offer must be made within two months of exceeding the threshold.
- ² The Takeover Board may grant an extension if there is good cause for doing so.

Section 2 Exceptions to the Duty to make an Offer**Art. 40** General exceptions

(Art. 135 para. 4, 136 FMIA)

- ¹ The duty to make an offer lapses, if:
 - a. the threshold is exceeded during a restructuring resulting from a capital downgrade and prompt capital increase for the purpose of offsetting a loss;
 - b. banks or securities dealers under SESTA acting independently or as a syndicate acquire equity securities as part of an issue and undertake to sell the share of equity securities exceeding the threshold within three months of exceeding the threshold and the sale actually takes place within this period.
- ² The claim to an exception under paragraph 1 or Article 136 paragraph 2 FMIA needs to be notified to the Takeover Board. The Takeover Board shall initiate an administrative procedure within five trading days if it has reason to suspect that the conditions in paragraph 1 have not been met.
- ³ The Takeover Board may extend the period under paragraph 1 letter b on request if there is adequate justification for doing so.

Art. 41 Particular exceptions

(Art. 135, 136 para. 1 FMIA)

- ¹ In the instances outlined under Article 136 paragraph 1 FMIA and in other justified cases, a person obliged to make an offer may be exempted from the duty to make an offer if there is good cause for doing so.
- ² Further justified cases under Article 136 paragraph 1 FMIA are particularly those cases where:
 - a. the acquiring person cannot control the target company, because another person or group has a higher voting share;
 - b. a member of an organised group under Article 136 paragraph 1 letter a FMIA exceeds the threshold, either individually or not; or
 - c. the previous acquisition was made indirectly (Art. 32), the acquisition is not one of the main aims of the transaction and the interests of the target company's shareholders remain protected.
- ³ Conditions may be attached when granting exceptions; in particular the setting of obligations incumbent on the acquiring person in the future.

⁴ The conditions under paragraph 3 transfer to a legal successor who acquires a shareholding exceeding 33⅓%, even if the legal successor is exempt from the duty to make an offer under Article 136 paragraph 2 FMIA.

Section 3 Determining the Offer Price

Art. 42 Stock exchange price

(Art. 135 paras. 2-4 FMIA)

¹ The offer price must be at least equal to the stock exchange price for every type of equity security in the target company.

² The stock exchange price under Article 135 paragraph 2 letter a FMIA corresponds to the volume-weighted average price of the on-order-book trades of the last 60 trading days prior to publication of the offer or the preliminary notification.

³ It must be adjusted to negate the effects of significant price influences triggered by special events, such as dividend distribution or capital transactions, which it is subject to during this period. An audit firm as outlined under Article 128 paragraph 1 FMIA must confirm the adequacy of the adjustment and show the calculation basis in its report.

⁴ If the listed equity securities are not liquid prior to disclosure of the offer or prior announcement, the audit firm must evaluate the company. The ensuing report shall outline the evaluation methods and basis for evaluation and provide an explanation of whether and, if so, to what extent, the setting of the minimum price is to deviate from the stock exchange price or company value.

Art. 43 Price of the previous acquisition

(Art. 135 paras. 2-4 FMIA)

¹ The price of the previous acquisition under Article 135 paragraph 2 letter b FMIA corresponds to the highest price paid by the buyer for equity securities in the target company over the past 12 months prior to publication of the offer or prior notification.

² It must be defined separately for each type of equity security. The price of the most expensive equity security relative to the nominal value is to form the basis for setting the appropriate ratio between the prices of different types of equity security under Article 135 paragraph 3 FMIA.

³ The equity securities in the target company acquired through the exchange of securities as part of the previous acquisition are to be calculated at their value at the time of exchange.

⁴ If the person buying or selling has added other payments in addition to the main payments for the previous acquisition, in particular if the person has provided securities or payment in kind, the price for the previous purchase shall be correspondingly reduced or increased.

⁵ An audit firm (Art. 128 FMIA) must review the valuation of the equity securities under Article 3 and the adequacy of the increase or decrease under Article 4 with accompanying calculation details in its report.

Art. 44 Indirect prior acquisition
(Art. 135 paras. 2-4 FMIA)

¹ If the prior acquisition was indirect within the meaning of Article 32 in conjunction with Article 11 letter c, the party making the offer must disclose the price paid for its share of the target company's equity securities in the offer prospectus.

² The valuation of this share must be audited by an audit firm.

Art. 45 Settlement of the offer price
(Art. 135 paras. 2-4 FMIA)

¹ The offer price may be paid in cash or exchanged against securities.

² Settlement against securities is permitted provided full payment in cash is offered as an alternative.

Art. 46 Evaluation of securities
(Art. 135 paras. 2-4 FMIA)

Article 42 paragraphs 2-4 apply to determining the value of the securities offered in exchange.

Art. 47 Exceptions
(Art. 135 paras. 2-4 FMIA)

The Takeover Board may grant exemptions from this section of the regulations (Art. 40–44) in specific instances to the person making the offer if there is good cause for doing so.

Chapter 7 **Cooperation between FINMA, the Takeover Board and** **Stock Exchanges**

Art. 48
(Arts. 122, 123 para. 1 FMIA; Art. 39 para. 1 FINMASA)

¹ FINMA, the Takeover Board and the stock exchange registration, disclosure and monitoring offices shall provide each other, either voluntarily or on request, with all information and relevant documentation required by these authorities and offices for performing their respective duties. In particular, they shall inform each other if they have grounds for suspecting a violation of the law requiring investigation by the relevant authority or office.

² In doing so, the authorities and offices involved shall observe official, professional and business secrecy and only use the information and relevant documentation received for the performance of their legal duties.

Chapter 8 Final Provisions

Art. 49 Repeal and amendment of other legislation

The repeal and amendment of other legislative instruments are regulated in Annex 2.

Art. 50 Transitional provision on the disclosure of shareholdings

¹ Disclosure notifications made under existing law retain their validity. Situations which arose prior to the FMIA coming into force and which need to be disclosed due to that Act and this Ordinance must be reported by 31 March 2016.

² Situations requiring notification which arise after this Ordinance comes into force may initially be reported and published under the current law, including a notice to that effect, up to 31 March 2016. The notification under the new legal regime must be submitted to the relevant disclosure office and the company by 31 March 2016.

³ If a disclosure office does not have an electronic publishing platform when this Ordinance enters into force, it has until 1 January 2017 to have such a platform available and in full operation.

⁴ During the period until a functional electronic publishing platform becomes available in accordance with paragraph 3, the company publishes its disclosure notifications in the Swiss Official Gazette of Commerce and in at least one of the prominent electronic media used for disseminating stock exchange information. The time of the communication of the disclosure notification to the electronic media is the decisive factor in determining compliance with the deadline under Article 24 paragraph 2. The published disclosure notification must be sent to the disclosure office at the same time.

Art. 50a¹⁶ Transitional Provision to the Amendment of 26 January 2017

The duty to report under Article 10 para. 2 FMIO-FINMA in its version amended on 26 January 2017 must be met by 31 August 2017.

Art. 51 Commencement

This Ordinance comes into force on 1 January 2016.

¹⁶ Inserted by No I of the FINMA Ordinance of 26 Jan. 2017, in force since 1 March 2017 (AS 2017 547).

Annex 1
(Art. 6 para. 1)

Settlement of Derivative Categories via a Central Counterparty¹⁷

¹⁷ No derivative categories that have to be settled via a central counterparty have been defined to date.

Annex 2
(Art. 49)

Repeal and Amendment of other Legislation

I

The FINMA Stock Exchange Ordinance of 25 October 2008¹⁸ is repealed.

II

The following legislative instruments are amended as follows:

...¹⁹

¹⁸ [AS 2008 6521, 2011 6285, 2013 1117]

¹⁹ The amendments can be viewed under AS 2015 5509.