

**Disclaimer : This translation of the Takeover Ordinance is unofficial and is given without warranty. The Takeover Board shall not be liable for any errors contained in this document. Only the German, French or Italian versions of the Takeover Ordinance have legal effect (Art. 70 para. 1 Federal Constitution).**

## **Ordinance of the Takeover Board on Public Takeover Offers**

**(Takeover Ordinance, TOO)**

**of 21 August 2008 (Status as of 1 January 2016)**

Approved by the Swiss Federal Banking Commission<sup>1</sup> on 24 September 2008

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*The Takeover Board,*

based on Article 126, 131, 132 paragraph 3, 133 paragraph 2, 134 paragraphs 3 and 5, 136 paragraph 1, and 138 of the Financial Market Infrastructure Act of 19 June 2015 (hereinafter referred to as “the FMIA”),

*decrees:*

### **Chapter 1: General Provisions**

*Art. 1*                      **Purpose**  
(Art. 1, Art. 131 let. c FMIA)

The purpose of this Ordinance is to ensure that public takeover offers are fair and transparent, and that investors are treated equally.

*Art. 2*                      **Definitions**  
(Art. 2 let. b and i FMIA)

In this Ordinance:

- a. equity securities refers to shares, participation certificates and profit sharing certificates.
- b. participation derivatives refers to participation derivatives as defined in Article 15 of the Financial Market Infrastructure Ordinance of the Swiss Financial Market Supervisory Authority dated 3 December 2015 (FMIO-FINMA).

*Art. 3*                      **Duties**  
(Art. 126 para. 3, Art. 136 para. 1 and Art.138 para. 1, FMIA)

<sup>1</sup> The Takeover Board verifies compliance with the provisions on public takeover offers (offers) in individual cases.

<sup>1</sup> Today: Swiss Financial Market Supervisory Authority.

<sup>2</sup> It rules in the form of decisions.

*Art. 4* Exemptions  
(Art. 131 FMIA)

<sup>1</sup> The Takeover Board may ex officio or in response to a request waive compliance with individual provisions of this Ordinance, provided this is justified by overriding interests.

<sup>2</sup> In particular, it may exempt the offeror<sup>3</sup> from compliance with individual provisions governing public takeover offers if its offer relates to its own equity securities and:

- a. equal treatment, transparency, fairness and good faith are guaranteed; and
- b. there are no indications of any circumvention of the requirements of the FMIA or other provisions.

## **Chapter 2: Pre-announcement of an offer**

*Art. 5* Principle and content  
(Art. 131 let. a FMIA)

<sup>1</sup> The offeror<sup>2</sup> may announce an offer before the publication of the offer prospectus.

<sup>2</sup> The pre-announcement shall contain the following information:

- a. the corporate name and registered office of the offeror;
- b. the corporate name and registered office of the offeree company;
- c. the equity securities and participation derivatives that are the subject of the offer;
- d. the offer price;
- e. the time limits for the publication of the offer and the period of the offer;
- f. any conditions attached to the offer.

<sup>2</sup> As the offerors are predominantly legal entities, they are referred to throughout the text as “it” or “they”.

**Art. 6**                    **Languages**  
(Art. 131 let. a and b FMIA)

- <sup>1</sup> The pre-announcement must appear in German and French.
- <sup>2</sup> If the pre-announcement appears or is circulated among investors in a further language, this version must correspond to the German and French texts, and all other offer documents must also be published in this language. The offer documents in this further language are to be published simultaneously.
- <sup>3</sup> The offeror is responsible for ensuring correspondence between the various language versions.

**Art. 7**                    **Publication**  
(Art. 131 let. a and b FMIA)

- <sup>1</sup> The offeror publishes the pre-announcement by:
  - a. publishing it on its website or on a website dedicated to the public offer;
  - b. delivering it to the major Swiss media, to the major news agencies active in Switzerland and to the major electronic media which distribute stock exchange information (financial information providers); and
  - c. delivering it to the Takeover Board.
- <sup>2</sup> This publication must occur at least 90 minutes before the start of trading or after the close of trading on the stock exchange on which the equity securities of the offeree company are listed.
- <sup>3</sup> The pre-announcement must be accessible to recipients of the offer either on the offeror's website or on a website dedicated to the public offer until the settlement of the offer.
- <sup>4</sup> The Takeover Board reproduces the pre-announcement on its website.
- <sup>5</sup> Together with the pre-announcement, the Takeover Board must be informed who represents the company in Switzerland.
- <sup>6</sup> The regulations governing ad hoc publicity may apply in addition.

**Art. 6b**                    *Abrogated*

**Art. 8**                    **Legal effects**  
(Art. 131 let. a FMIA)

- <sup>1</sup> Within six weeks of the pre-announcement, the offeror must publish an offer prospectus that corresponds to the pre-announcement. The Takeover Board may extend this period if this is justified by overriding interests, and in particular if the offeror has to obtain approval from an authority, in particular from a competition authority.

<sup>2</sup> The offer prospectus may contain modifications in comparison with the pre-announcement only if these are generally favourable to the recipients (e.g. an increase in the offer price or removal of conditions).

<sup>3</sup> The date on which the pre-announcement is published is decisive for:

- a. the calculation of the minimum price (Art. 135 para. 2 FMIA, Art. 9 para. 6 of this Ordinance);
- b. the obligation to give notice of the transactions (Art. 134 FMIA, Art. 38 to 43 of this Ordinance);
- c. the defensive measures of the offeree company (Art. 132 para. 2 and 3 FMIA, Art. 35 to 37 of this Ordinance);
- d. the duty of the offeror to comply with the best price rule (Art. 10); and
- e. the calculation of the time limit in accordance with Art. 19 para. 1 let. g.
- f. the obligation to offer a cash alternative (Art. 9a).

*Art. 8 Abrogated*

### **Chapter 3: Offer**

*Art. 9 Principle of equal treatment*  
(Art. 127 para. 2 and Art. 131 let. c FMIA)

<sup>1</sup> The principle of equal treatment applies to all categories of equity securities and to all participation derivatives to which the offer relates.

<sup>2</sup> The offer must extend to all categories of listed equity securities of the offeree company. If the offer also extends to unlisted equity securities of the offeree company or participation derivatives, the principle of equal treatment shall also apply to these.

<sup>3</sup> The offeror shall ensure that an appropriate relationship exists between the prices offered for the various equity securities and participation derivatives.

<sup>4</sup> The offer must also extend to equity securities that derive from participation derivatives before the end of the additional acceptance period (Art. 14 para. 5), but not necessarily the participation derivatives themselves.

<sup>5</sup> If the offer includes equity securities whose acquisition would not trigger an obligation to make an offer, the offeror is free to decide the offer price. In doing so, it must ensure that a comparable relationship exists between the prices offered for the various equity securities and participation derivatives. If the offeror is unable to satisfy all acceptance declarations, it must satisfy them on a pro rata basis.

<sup>6</sup> If the offer includes equity securities whose acquisition would cross the threshold requiring the submission of a mandatory offer (change of control offer), it must be extended to all the listed equity securities of the offeree company. The price of the offer must comply with the rules on mandatory offers, with the exception of Art. 45 para. 2 FMIO-FINMA.

**Art. 9a** Voluntary exchange offers

(Art. 127 para.2, 131 let. c FMIA)

<sup>1</sup> In the case of voluntary offers whose price consists entirely or partially of securities, the offeror must offer the shareholders a complete cash payment (cash alternative) if it acquires equity securities of the target company for cash in the period between the publication of the offer and its settlement.

<sup>2</sup> In the case of a change of control offer in which the price consists entirely or partially of securities, the offeror must offer the shareholders a cash alternative if it has acquired equity securities constituting 10 percent or more of the share or participation capital of the offeree company for cash in the 12 months preceding the publication of the offer.

**Art. 9b** Value of the cash alternative

(Art. 127 para.2, 131 let. c FMIA)

In all exchange offers, the securities offered and the cash alternative may have different values.

**Art. 10** Best price rule

(Art. 127 para. 2 and Art. 131 let. c FMIA)

<sup>1</sup> If the offeror acquires equity securities of the offeree company in the period running from the publication of the offer until six months after the additional acceptance period at a price that exceeds the offer price, it must offer this price to all recipients of the offer (best price rule).

<sup>2</sup> The best price rule also applies to the acquisition of participation derivatives and to offers relating to such instruments.

**Art. 11** Acting in concert or as an organised group

(Art. 127 para. 3 and Art. 131 let. f FMIA)

<sup>1</sup> Art. 12 para. 1 FMIO-FINMA applies analogously to persons who act in concert or as an organised group with the offeror with a view to making an offer.

<sup>2</sup> The representative of the offeror shall not be presumed to be acting in concert or in an organised group with the offeror.

**Art. 12** Obligations of persons who co-operate with the offeror

(Art. 127 para. 3 and Art. 131 let. f FMIA)

<sup>1</sup> Persons who co-operate with the offeror in accordance with Art. 11 must comply with the following rules:

- a. the rules governing transparency (Art. 23);
- b. the rules concerning equal treatment, in particular the obligation to offer a cash alternative and the best price rule (Art. 9a and 10);
- c. the rules governing fairness (Art. 13 para. 1);

- d. the rules governing the obligation to give notice of the transactions (Chapter 8).

<sup>2</sup> Persons co-operating with the offeror are under no obligation to pay the offer price unless notice to the contrary is given in the offer.

<sup>3</sup> Investments in the offeree company held by persons co-operating with the offeror shall be added to the holdings of the offeror (Art. 19 para. 1 let. f and g, Art. 44 para. 3 and Art. 47).

#### *Art. 13*                    Conditions of the offer

(Art. 131 let. b FMIA)

<sup>1</sup> If the offeror has a legitimate reason, the offer may be made subject to conditions. For mandatory offers, Art. 38 FMIO-FINMA shall apply.

<sup>2</sup> In principle, the offer may only be made subject to conditions if the offeror has no decisive influence over whether such conditions come to apply.

<sup>3</sup> Where the nature of the conditions is such that the offeror must make a contribution before the conditions come to apply, the offeror must take all reasonable measures to ensure that the conditions come to apply.

<sup>4</sup> The offeror may waive any or all of the conditions at any time. The settlement of the offer shall result in all outstanding conditions being waived.

<sup>5</sup> In general, the offeror must declare in the definitive announcement of the interim result (Art. 44 para. 2) that:

- a. the conditions of the offer have been fulfilled; or
- b. it is waiving one or more conditions.

<sup>6</sup> It may postpone this declaration until the settlement of the submitted offer if:

- a. it demonstrates that there is an overriding interest in doing so; and
- b. the Takeover Board agrees to the postponement.

#### *Art. 14*                    Period of the offer

(Art. 130 para. 2 and Art. 131 let. e FMIA)

<sup>1</sup> The offer may be accepted only after a cooling-off period.

<sup>2</sup> This cooling-off period is usually 10 trading days from publication of the offer prospectus in the newspapers. It may be lengthened or shortened by the Takeover Board.

<sup>3</sup> The offer must remain open for at least 20 trading days. This period may be shortened at the request of the offeror to 10 trading days if:

- a. the offeror holds the majority of the voting rights in the offeree company before the publication of the offer; and
- b. the report of the board of directors of the offeree company is published in the offer prospectus.

<sup>4</sup> The offer may remain open for no more than 40 trading days. A shorter offer period may be extended to 40 trading days if the offeror reserves the right to do this in the offer. An extension beyond 40 trading days requires the consent of the Takeover Board, which may adjust the schedule for an offer if this is justified by overriding interests.

<sup>5</sup> If the offer is successful, the offeror must grant a right of retrospective acceptance of the offer for a period of 10 trading days from the date of publication of the definitive announcement of the interim result (additional acceptance period). The foregoing also applies to an unconditional offer.

<sup>6</sup> Normally, the offer must be settled no later than 10 trading days after the end of the additional acceptance period. If the offer remains subject to conditions (Art. 13 para. 5), settlement may be postponed with the prior consent of the Takeover Board. The time when the offer will be settled must be indicated in the offer prospectus.

*Art. 15*                      Amendment of an offer

(Art. 131 let. e FMIA)

<sup>1</sup> A published offer may only be amended if the amendment concerned is generally favourable to the recipients (e.g. an increase of the offer price, removal of conditions).

<sup>2</sup> Art. 18 applies to the publication of the amendment of the offer.

<sup>3</sup> The amended offer must be published no later than the start of trading on the last trading day of the offer period.

<sup>4</sup> If an amended offer is published less than 10 trading days before the expiry of the offer, the offer period shall be extended so that the offer remains open for at least 10 trading days from the date of publication of the amended offer. Both these time limits shall be reduced to five trading days if the report of the board of directors of the offeree company is published with the amended offer.

<sup>5</sup> The deadlines are calculated from the date of electronic publication.

*Art. 16*                      Time limit for withdrawal from a prohibited offer

(Art. 129 and Art. 131 let. b FMIA)

If an offer is prohibited, any recipient of the offer may withdraw from the contract or rescind an already executed sale by giving written notice within a year of the decision becoming legally binding.

## Chapter 4: Offer prospectus

### Section 1: General provisions

#### *Art. 17* Principles

(Art. 127 para. 1 and Art. 131 let. b FMIA)

<sup>1</sup> The offer prospectus shall contain all the information that is necessary for the recipients of the offer to make an informed decision.

<sup>2</sup> If information essential for the recipients of the offer comes to the attention of the offeror while the offer is open, the offeror must amend the offer prospectus.

<sup>3</sup> The offeror must submit the offer prospectus and any amendments thereto to the Takeover Board for inspection no later than the day of publication.

#### *Art. 18* Publication of the offer prospectus.

The offeror publishes the offer prospectus pursuant art. 6 and 7.

### Section 2: Content

#### *Art. 19* Information about the offeror

(Art. 127 para. 1 and Art. 131 let. b FMIA)

<sup>1</sup> The offer prospectus shall contain the following information:

- a. the corporate name, registered office, capital and principal business operations of the offeror;
- b. the identity of the shareholders or shareholder groups that hold more than 3 percent of the voting rights, plus the percentage of their holdings;
- c. particulars of shareholders who directly or indirectly control the offeror;
- d. persons acting in concert with the offeror (Art. 11);
- e. the address where the latest published annual accounts of the offeror may be obtained without delay and free of charge;
- f. the share of capital and voting rights that the offeror holds in the offeree company, irrespective of whether such rights are exercisable;
- g. the quantity of equity securities in the offeree company and related participation derivatives that have been bought or sold by the offeror in the 12 months prior to the offer, with details of the highest purchase price.

<sup>2</sup> For the information referred to in para. 1 let. f and let. g, the participation derivatives must be listed separately and the information referred to in Art. 22 para. 2 and 3 FMIO-FINMA must be disclosed.

<sup>3</sup> In the case of exchange offers, the information specified in para. 1 let. g is to be given separately for the equity securities acquired for cash and for those acquired for securities.

**Art. 20** Information about the financing of the offer

(Art. 127 para. 1 and Art. 131 let. b FMIA)

<sup>1</sup> The offer prospectus shall contain the essential details of the financing of the offer as well as confirmation from the auditor that the offeror has taken the necessary measures to ensure that the required funds are available on the settlement date.

<sup>2</sup> If securities offered in exchange are not yet available, the auditor must confirm that the offeror has taken all the necessary measures to ensure that the securities are available on the settlement date.

**Art. 21** Information about the object and the price of the offer

(Art. 127 para. 1 and Art. 131 let. b FMIA)

<sup>1</sup> The offer prospectus shall contain information on the capital of the offeree company and specify the equity securities and participation derivatives covered by the offer. In the case of a partial offer, it shall also specify the maximum number of equity securities and participation derivatives that are to be acquired.

<sup>2</sup> It shall specify the price offered for each equity security and financial instrument, or the exchange ratio in the case of a public exchange offer.

**Art. 22** Offer for two or more categories of equity securities and for participation derivatives

(Art. 127 para. 1 and Art. 131 let. b FMIA)

<sup>1</sup> The offer prospectus shall explain how the ratio between the prices of different categories of equity securities and participation derivatives, or the related exchange ratio, has been calculated.

<sup>2</sup> The auditor shall confirm that the ratios are appropriate.

**Art. 23** Information about the offeree company

(Art. 127 para. 1 and Art. 131 let. b FMIA)

<sup>1</sup> The offer prospectus shall contain information regarding:

- a. the basic intentions of the offeror with regard to the offeree company;
- b. the agreements between the offeror and the offeree company and the latter's management bodies and shareholders.

<sup>2</sup> The offeror must confirm in the offer prospectus that it has received no information about the offeree company, either directly or indirectly, from the latter that is not in the public domain and which might have a critical influence on the decision of the recipients of the offer.

**Art. 24 Additional information in the case of public exchange offers**

(Art. 127 para. 1 and Art. 131 let. b FMIA)

<sup>1</sup> The offer prospectus shall describe the rights attached to the securities offered in exchange, and in particular the shareholder and financial rights, as well as the transferability of the securities.

<sup>2</sup> If the securities offered in exchange are listed on a stock exchange, the offer prospectus shall contain at least the following information:

- a. the exchange on which the securities are listed;
- b. any intentions of the offeror concerning their delisting and the essentials of the procedure;
- c. threshold values for the disclosure of shareholdings;
- d. major shareholders insofar as the offeror has knowledge of any;
- e. threshold values that trigger an obligation to offer;
- f. details of the performance over the past 3 years of the securities offered in exchange.

<sup>3</sup> The offer prospectus shall indicate where the last three annual reports and the latest interim report from the company whose securities are being offered in exchange may be obtained without delay and free of charge.

<sup>4</sup> The offer prospectus shall also contain information about significant changes that have occurred since the last annual or interim report in the assets and liabilities, financial position, earnings and prospects of the company.

whose securities are being offered in exchange. If no such changes have occurred, this must be confirmed in the offer prospectus.

<sup>5</sup> The offer prospectus shall contain information about the anticipated effects of a successful offer on the assets and liabilities, financial position and earnings of the company whose securities are being offered in exchange.

<sup>6</sup> If the securities offered in exchange are not listed on a stock exchange, or if their market is illiquid, the offer prospectus must contain a valuation of the securities offered in exchange (Art. 46 FMIO-FINMA).

<sup>7</sup> Securities offered in exchange that are listed on a foreign stock exchange are only regarded as being “listed on a stock exchange” within the sense of this Article if the requirements for listing on the foreign stock exchange are equivalent to those for a Swiss stock exchange.

**Art. 25 Other information**

(Art. 127 para. 1 and Art. 131 let. b FMIA)

<sup>1</sup> If the offer has been subject to a prior examination (Art. 59), the offer prospectus shall contain the statement of grounds for the decision by the Takeover Board.

<sup>2</sup> Where necessary, the offer prospectus will specify the period within which and the conditions under which a shareholder in possession of at least 3 percent of the voting rights in the offeree company can:

- a. claim party rights;
- b. file an objection against the decision of the Takeover Board.

<sup>3</sup> The Takeover Board may stipulate that the offeror must include additional information in the offer prospectus that is essential for the recipients of the offer.

## **Chapter 5: Examination of the offer**

### *Art. 26* Auditor (Art. 128 and Art. 131 let. d FMIA)

<sup>1</sup> Securities traders and audit companies licensed to audit securities traders (Art. 9a para. 1 of the Act on Supervision of the Audits of 16 December 2005) shall be authorised to examine offers.

<sup>2</sup> The auditor must be independent of the offeror, the offeree company and any persons acting in concert with them.

### *Art. 27* Duties of the auditor prior to publication of the offer (Art. 128 and Art. 131 let. d FMIA)

<sup>1</sup> Prior to the publication of the offer, the auditor shall verify whether the offer prospectus complies with the FMIA and the ordinances, as well as with any decisions by the Takeover Board in connection with the offer. It shall in particular verify:

- a. that the offer prospectus is complete and accurate;
- b. whether the recipients of the offer have been treated equally;
- c. the financing of the offer and the availability of funds;
- d. the availability of any securities offered in exchange.

<sup>2</sup> The auditor shall prepare a brief report, which the offeror must publish in the offer prospectus.

<sup>3</sup> If the offeror amends the offer or the offer prospectus (Art.15 and Art. 17 para. 2), the auditor shall also prepare a brief report on the amendments concerned, and this report must be published with the amended offer.

### *Art. 28* Duties of the auditor after publication of the offer (Art. 128 and Art. 131 let. d FMIA)

<sup>1</sup> After publication of the offer, the auditor shall verify whether the provisions of the FMIA and ordinances, as well as the decisions of the Takeover Board in connection with the offer, have been complied with throughout the offer period. It shall in particular verify:

- a. notifications of the transactions referred to in Art. 134 FMIA;
- b. the publication of interim and final results;
- c. whether the offer has been settled in the proper manner;
- d. the compliance with Art. 9a and 10.

<sup>2</sup> The auditor shall submit a final report to the Takeover Board, specifying the principles on which it has based its examination.

*Art. 29* Co-operation with the Takeover Board

(Art. 128 and Art. 131 let. d FMIA)

<sup>1</sup> The auditor shall provide the Takeover Board with all the information that the latter requests in order to carry out its duties.

<sup>2</sup> If the auditor has reason to believe that the FMIA, ordinances or decisions issued by the Takeover Board in connection with the offer have been infringed after publication of the offer, it shall inform the Takeover Board of this immediately and submit a special report to the latter.

<sup>3</sup> The Takeover Board may instruct the auditor to carry out special examinations and to provide corresponding reports.

## **Chapter 6: Report of the board of directors of the offeree company**

*Art. 30* Principles

(Art. 132 para. 1 and 3 FMIA)

<sup>1</sup> The report of the board of directors of the offeree company shall contain all the information that is required for the recipients of the offer to be able to make an informed decision. It shall in particular explain the effects of the offer on the offeree company and its shareholders, and must be amended in the event of significant developments.

<sup>2</sup> The published information must be accurate and complete. If the report contains specific information about the expected results of the offeree company, an explanation must be given of the principles governing the information and the assumptions on which the forecasts are based.

<sup>3</sup> The report may recommend that the offer be accepted or rejected. It may, however, also enumerate the advantages and disadvantages of the offer without making a recommendation.

<sup>4</sup> The report shall present its arguments clearly, together with all the essential factors that have influenced the adopted position. It shall state the result of the vote of the board of directors, including the number of votes cast for and against.

<sup>5</sup> If the recommendation of the board of directors of the offeree company is based on the assessment of a third party (a fairness opinion), this shall form an integral part of the report. The basis of the assessment, the method of assessment and the parameters applied are to be disclosed. The report shall contain details of the precise Internet

address where the fairness opinion is accessible free of charge, as well as information where the opinion may be obtained without delay and free of charge.

<sup>6</sup> A third party instructed to prepare a fairness opinion must be suitably qualified and independent of the offeror, the offeree company and persons acting in concert with them.

*Art. 31* Particular information

(Art. 131 para. 1 and 3 FMIA)

<sup>1</sup> The report shall outline the intentions of each shareholder holding more than 3 percent of the voting rights, insofar as such intentions are known to the board of directors.

<sup>2</sup> It shall, if applicable, indicate the defensive measures that the offeree company intends to take or has already taken, and mention the resolutions passed by the general meeting in application of Art. 132 para. 2 FMIA.

<sup>3</sup> With the consent of the Takeover Board, certain items of information may be omitted from the report provided the statutory auditors of the offeree company demonstrate that this is justified by clearly overriding company interests, and specifies these interests.

*Art. 32* Conflict of interest

(Art. 132 para. 1 and 3 FMIA)

<sup>1</sup> The report must state whether any member of the board of directors or the management board has a conflict of interest.

<sup>2</sup> It must in particular state whether any member of the board of directors:

- a. has entered into an agreement with, or has any other ties to, the offeror;
- b. was elected on the proposal of the offeror;
- c. is to be re-elected;
- d. is a company officer or employee of the offeror or of a company that has significant business relations with the offeror;
- e. exercises his or her mandate according to the instructions of the offeror.

<sup>3</sup> The report shall also indicate the consequences that the offer has for the individual members of the board of directors and management board, in particular in relation to the remuneration they receive for continuing or terminating their activities.

<sup>4</sup> In the event of any conflict of interest, the report shall indicate the measures taken by the offeree company in order to prevent the conflict of interest from prejudicing the recipients of the offer.

*Art. 33* Publication of the report

(Art. 132 para. 1 and 3 FMIA)

<sup>1</sup> The report can be published in the offer prospectus.

<sup>2</sup> If the report is not published in the offer prospectus, the target company publishes it at the latest on the 15th trading day after the publication of offer prospectus

<sup>3</sup> The Articles 6 and 7 are applicable.

<sup>4</sup> Paragraphs 1 and 2 apply to the publication of amendments to the report.

*Art. 34*                    Amendment of the offer

(Art. 132 para. 1 and 3 FMIA)

<sup>1</sup> Following any amendment of the offer, a supplement to the report by the board of directors must be published. This supplement may be issued in summarised form.

<sup>2</sup> The supplement may be published with the amended offer.

<sup>3</sup> If the supplement is not published with the amended offer, the target company publishes it within eight days after the publication of the offer prospectus.

<sup>4</sup> The Articles 6 and 7 are applicable.

## **Chapter 7: Defensive measures by the offeree company**

*Art. 35*                    Reporting obligation

(Art. 132 para. 2 and 3 FMIA)

Once the offer has been published, the offeree company shall notify the Takeover Board in advance about any defensive measure that it is considering.

*Art. 36*                    Unlawful defensive measures

(Art. 132 para. 2 FMIA)

<sup>1</sup> The assets and liabilities of the offeree company shall also include the off-balance-sheet

positions, and in particular those deriving from contracts that involve significant risks or commitments.

<sup>2</sup> In particular, the offeree company shall be deemed to be acting unlawfully if, without a resolution of the general meeting, it:

- a. sells or acquires assets the value or price of which exceeds 10 percent of the balance sheet total, or that contribute more than 10 percent to the earning power of the company (based on the latest, annual or interim accounts, including consolidated accounts if applicable);
- b. sells or pledges any parts of the business or its intangible assets that form part of the main subject matter of the offer and have been specified as such by the offeror;
- c. enters into contracts with members of the board of directors or management board that provide for unusually high remuneration payments in the event of their leaving the company;

- d. issues shares on the basis of the authorised capital without granting subscription rights to the shareholders, unless the resolution of the general meeting establishing the authorised capital expressly provides for the issue of shares in the event of an offer. The foregoing also applies to the issue of bonds with conversion or option rights based on conditional capital with no pre-emptive subscription right for shareholders;
  - e. buys or sells its own equity securities or securities in the company whose securities are being offered in exchange, or related participation derivatives;
  - f. issues or grants rights to acquire its equity securities, and in particular conversion or option rights.
- <sup>3</sup>The transactions specified in para. 2 let. e and let. f are permitted if they occur:
- a. as part of an employee equity participation scheme; or
  - b. in fulfilment of obligations arising from participation derivatives that were entered into before publication of the offer.

*Art. 37*                      Inadmissible defensive measures  
(Art. 132 para. 3 FMIA)

Defensive measures that clearly infringe against the provisions of company law shall be regarded as inadmissible measures as defined in Art. 132 para. 3 FMIA.

## **Chapter 8: Transaction reports**

*Art. 38*                      Reporting obligation of involved parties  
(Art. 134 para. 1 and 2 FMIA)

<sup>1</sup> From the date of publication of the offer until the end of the additional acceptance period, all parties to the proceedings must notify the Takeover Board and the relevant disclosure office about:

- a. any transactions they have carried out involving equity securities of the offeree company or related participation derivatives;
- b. in the case of a public exchange offer: any transactions involving the securities offered in exchange and the related participation derivatives.

<sup>2</sup> Anyone acting in concert with the offeror (Art. 11) is subject to the same reporting obligation.

*Art. 39*                      Reporting obligation of major shareholders  
(Art. 134 para. 1 - 3 and 5 FMIA)

The obligation to report also applies to:

- a. anyone who directly or indirectly holds at least 3 percent of the voting rights, irrespective of whether they are exercisable, in the offeree company or the company whose securities are being offered in exchange;

- b. anyone acting in concert with third parties in accordance with Art. 12 FMIO-FINMA and thus holding at least 3 percent of the voting rights in accordance with let. a.

*Art. 40*            Application of FMIO-FINMA  
(Art. 134 FMIA)

Art. 10 to 19 FMIO-FINMA shall apply analogously to the reporting obligation provided for in this Chapter.

*Art. 41*            Content of reports  
(Art. 31 para. 5 FMIA)

A report must be submitted every day and shall contain the following information for each transaction:

- a. subject matter of the transaction (equity securities or participation derivatives with particulars in accordance with Art. 22 FMIO-FINMA);
- b. nature of the transaction (acquisition, sale, securities lending and comparable transactions, exercise of participation derivatives, etc.);
- c. price;
- d. time of conclusion;
- e. whether executed on- or off-exchange and the identities of the securities traders;
- f. the form and number of all equity securities or participation derivatives and attached voting rights held by the person required to report the transactions at the end of the day.

*Art. 42*            Time of notification  
(Art. 134 para. 5 FMIA)

The reports must reach the Takeover Board and relevant disclosure office by no later than 12 noon on the trading day following the transaction.

*Art. 43*            Publication  
(Art. 131 let. c and Art. 134 FMIA)

The Takeover Board shall publish the transaction reports on its website.

## Chapter 9: Publication of result

### *Art. 44* Publication of interim result (Art. 130 and Art. 131 let. c FMIA)

<sup>1</sup> On the first trading day following the offer period, the offeror shall report the provisional announcement of the interim result of the offer as precisely as possible. The offeror notifies this announcement to the disclosure authority.

<sup>2</sup> No later than four trading days following the offer, the offeror publishes the definitive announcement of the interim result.

<sup>3</sup> The report on the interim result must contain:

- a. the number of equity securities tendered for sale to the offeror in response to the offer, expressed in absolute figures and as a percentage of the equity securities to which the offer relates (success rate);
- b. details of the entire holding of the offeror in the offeree company at the time of expiry of the offer (voting rights, irrespective of whether they are exercisable, and capital) as a percentage of all equity securities in the offeree company (holding percentage).

<sup>4</sup> This information must be published for each category of equity securities and each financial instrument covered by the offer, as well as for the entire capital.

5 Art. 6 and 7 are applicable to the publication of interim result.

### *Art. 45* Conditional offer (Art. 130 and Art. 131 let. c FMIA)

In the case of a conditional offer, the definitive announcement of the interim and final results is to report whether the conditions have been met.

### *Art. 46* Additional acceptance period (Art. 130 para. 2 and Art. 131 let. c FMIA)

<sup>1</sup> If the offer has been successful, the report must draw attention to the right of subsequent acceptance within 10 trading days (Art. 14 para. 5).

<sup>2</sup> This additional period of 10 trading days begins with the date of publication of the report on the definitive announcement of the interim result.

### *Art. 47* Publication of the final result (Art. 130 and Art. 131 let. c FMIA)

<sup>1</sup> After the additional acceptance period, notification must be given about the following:

- a. the entire holding of the offeror in the offeree company (voting rights, irrespective of whether they are exercisable, and capital) as a percentage of all equity securities (holding percentage); and
- b. the form and number of the held equity securities.

<sup>2</sup> Articles 6, 7 and 44 shall also apply.

## Chapter 10: Competing Offers

*Art. 48*            Applicable principles in the event of two or more offers  
(Art. 133 FMIA)

<sup>1</sup> If two or more offers to acquire equity securities are published, the last offer is termed the competing offer and the previous offer is the initial offer.

<sup>2</sup> Unless otherwise provided in this Chapter, the competing offer is subject to all the provisions governing public takeover offers.

<sup>3</sup> If the minimum price provisions apply to the competing offer, the stock exchange price in accordance with Art. 135 para. 2 FMIA is based on the volume-weighted average price of the stock exchange transactions in the last 60 trading days before:

- a. publication of the pre-announcement of the initial offer; or
- b. publication of the offer prospectus for the initial offer if no pre announcement has been published.

<sup>4</sup> The recipients of the offers must, irrespective of the order of publication, be able to choose freely between the various offers.

<sup>5</sup> The total duration of the procedure must not be excessively long. The Takeover Board may in particular stipulate the maximum period of the various offers and reduce the periods allowed for the revision of offers.

*Art. 49*            Equal treatment of the offerors by the offeree company  
(Art. 133 FMIA)

<sup>1</sup> The offeree company shall treat all offerors equally. In particular, it shall provide them all with the same information.

<sup>2</sup> The unequal treatment of individual offerors is possible only with the prior consent of the Takeover Board if the offeree company demonstrates that it has an overriding company interest.

*Art. 50*            Publication  
(Art. 133 FMIA)

<sup>1</sup> A competing offer may be published by means of a pre-announcement or an offer prospectus no later than the last trading day of the offer period of the initial offer.

<sup>2</sup> If a competing offer is published by means of a prior announcement, the offer prospectus must be published within 5 trading days thereafter. The Takeover Board may extend this time limit on substantial grounds.

<sup>2bis</sup> Articles 6 and 7 apply.

<sup>3</sup> The competing offer shall remain open for as long as the initial offer, but for no less than 10 trading days.

*Art. 51*            Legal effects  
(Art. 133 FMIA)

<sup>1</sup> If the competing offer expires after the initial offer, the period of the initial offer shall be automatically extended until the expiry of the competing offer. The converse applies if the period of the initial offer expires after that of the competing offer.

<sup>2</sup> Following publication of a competing offer, the recipients may withdraw their acceptance declarations of the initial offer at any time up to its expiry.

<sup>3</sup> The initial offer may be revised in accordance with the conditions cited in Art. 52. The initial and competing offers may be extended only with prior consent of the Takeover Board.

*Art. 52*            Amendment of initial and competing offers  
(Art. 133 FMIA)

<sup>1</sup> An offer may be amended no later than the fifth trading day prior to its expiry, including any extension of the offer period in accordance with Art. 51 para. 1.

<sup>2</sup> In addition, all other provisions governing the publication of an offer apply to the amendment of an offer.

<sup>3</sup> The amended offer must remain open for 10 trading days. This period may only be extended with the prior consent of the Takeover Board.

## **Chapter 11: Potential offer**

*Art. 53*  
(Art. 131 let. a FMIA)

<sup>1</sup> If anyone announces that they are considering making a public takeover offer (a potential offeror), the Takeover Board may require this person within a specified period to either:

- a. publish an offer for the offeree company; or
- b. publicly declare that for six months it will neither make an offer nor exceed the threshold that triggers an obligation to make an offer.

<sup>2</sup> The Takeover Board shall consult the potential offeror and the offeree company before imposing any requirements.

<sup>3</sup> The Takeover Board may exempt the potential offeror from the requirement described in para. 1 let. b, in particular if a third party makes an offer for the offeree company.

<sup>4</sup> Provided it is advantageous to the recipients of the offer, an offer from a potential offeror that is published later may be deemed to have been the subject of a pre announcement at the time of disclosure in accordance with para. 1 if the potential offeror:

- a. fails to comply with the requirement imposed by the Takeover Board in accordance with para. 1;
- b. fails to comply with its declaration in accordance with para. 1 let. b.

## Chapter 12: Proceedings

### *Art. 54* Committees

(Art. 126 para. 1 and 5, Art.131 let. g FMIA)

- <sup>1</sup> The decisions of the Takeover Board shall be issued by a committee, which shall normally comprise three members and shall act on behalf of the Takeover Board.
- <sup>2</sup> The President of the Takeover Board shall appoint the committee together with its chairperson and, if necessary, deputy chairperson. The President or the chairperson of the committee may appoint up to two substitute members.
- <sup>3</sup> The committee issues the decisions in the proceedings for which it has been formed.
- <sup>4</sup> The committee may consult the Takeover Board at any time on specific questions.

### *Art. 55* Secretariat

(Art. 126 para. 1 and Art. 131 let. g FMIA)

- <sup>1</sup> The Takeover Board has a permanent Secretariat.
- <sup>2</sup> The Secretariat prepares the business of the Takeover Board, makes proposals to it and implements its decisions. It deals directly with participants in proceedings, third parties and authorities.
- <sup>3</sup> The Takeover Board may instruct the Secretariat to examine additional business.
- <sup>4</sup> The Secretariat may provide information on the interpretation of the FMIA and the ordinance provisions that regulate public takeover offers if the person concerned:
  - a. provides the Secretariat with the required factual information; and
  - b. proves that he or she has a legitimate reason.
- <sup>5</sup> The Takeover Board is not bound by information provided by the Secretariat.

### *Art. 56* Parties

(Art. 126 para. 1 and 5, Art. 131 let. g, Art. 139 para. 2 and 3 FMIA)

- <sup>1</sup> The offeror, persons acting in concert with the offeror (Art. 11) and the offeree company all qualify as parties to the proceedings.
- <sup>2</sup> If there are two or more offers, each offeror qualifies as a party.
- <sup>3</sup> A shareholder providing evidence of holding at least 3 percent of the voting rights in the offeree company, irrespective of whether they are exercisable (a qualified shareholder) qualifies as a party if:
  - a. requests the Takeover Board to be granted the same in accordance with Art. 57; or

- b. files an objection in accordance with Art. 58.

<sup>4</sup> In accordance with para. 3, the investment must be made from the following point on:

- a. in the procedures regarding the examination of the offer (Art. 59 and 60): from the publication of the pre-announcement or, if no pre-announcement was published, from the publication of the offer prospectus;
- b. in all other procedures (Art. 61): from the publication of the first decision.

*Art. 57* Request by a qualified shareholder

(Art. 139 para. 3 FMIA)

<sup>1</sup> A request from a qualified shareholder to qualify as a party must be received by the Takeover Board within five trading days from the:

- a. date of publication of the offer prospectus or, if the dispositive part of the first decision by the Takeover Board on the offer is published before the offer prospectus, after publication of that decision; or,
- b. in all other procedures, from the publication of the first decision in this procedure (Art. 61).

<sup>1bis</sup> The publication on the website of the Swiss Takeover Board is triggering the relevant deadline.

<sup>2</sup> At the same time as the request is made, the applicant must furnish proof of the holding.

<sup>3</sup> The Takeover Board may at any time request proof that the shareholder continues to hold at least 3 percent of the voting rights in the offeree company, irrespective of whether they are exercisable.

<sup>4</sup> Qualification as a party remains valid in relation to any further decisions issued in connection with the offer in question, provided the holding in accordance with Art. 56, para. 3 remains.

*Art. 58* Objection by a qualified shareholder

(Art. 126 para. 1 and 5, Art. 131 let. g FMIA)

<sup>1</sup> A qualified shareholder who has yet to participate in the proceedings may file an objection with the Takeover Board:

- a. against the first decision issued by the Takeover Board on the offer: within five trading days of the publication of the decision;
- b. in all other procedures (Art. 61): within five trading days of the publication of the decision.

<sup>2</sup> A qualified shareholder who has qualified as a party in good time, but who could not be consulted before the decision was issued, may file an objection within five trading days after publication of the decision.

<sup>3</sup> The objection must contain a formal request and a summary of the legal grounds, as well as proof of the holding in accordance with Art. 56 para. 3 and 4.

<sup>4</sup> If the objection is admissible, the Takeover Board shall issue a decision after hearing the parties.

*Art. 59*            Prior examination of the offer  
(Art. 126 para 1 and 5, Art. 131 let. g FMIA)

<sup>1</sup> The offeror may submit the draft of a pre-announcement or offer prospectus to the Takeover Board for examination before publication.

<sup>2</sup> The Takeover Board shall open proceedings and invite the offeree company to state its opinion. After hearing the parties, the Takeover Board shall issue a decision and publish the same on its website.

*Art. 60*            Subsequent examination of the offer  
(Art. 126 para. 1 and 5, Art. 131 let. g FMIA)

<sup>1</sup> If the pre-announcement or the offer prospectus is published without a prior examination, the Takeover Board shall open proceedings and invite the parties to state their opinions.

<sup>2</sup> After hearing the parties, the Takeover Board shall issue a decision and publish the same on its website.

*Art. 61*            Procedure relating to the obligation to make an offer  
(Art. 131 let. g, Art. 136 para. 1 FMIA, Art. 41 FMIO-FINMA)

<sup>1</sup> In all other procedures, in particular if the Takeover Board receives an application for an exemption from the obligation to make an offer or for a declaration that the obligation to make an offer does not apply, the Takeover Board shall open proceedings and invite the parties to state their opinions.

<sup>1bis</sup> Before the decision is opened, the target company may present an opinion of its board of directors that the target company wants to publish simultaneously with the Takeover Board's decision .

<sup>2</sup> The Takeover Board shall issue a decision and publish the same on its website.

<sup>3</sup> The offeree company publishes:

- a. the potential statement of its board of directors;
- b. the dispositive part of the decision of the Takeover Board; and
- c. notice of the time limit and conditions by which a qualified shareholder may file an objection against the decision of the Takeover Board.

<sup>4</sup> Art. 6 and 7 apply to this publication.

*Art. 62*            Notification  
(Art. 126 para. 1 and Art. 138 let. g FMIA)

<sup>1</sup> Anyone may notify the Takeover Board of matters of relevance to the law on takeovers.

<sup>2</sup> The Takeover Board shall provide the person submitting the report with an acknowledgement of receipt.

<sup>3</sup> A person submitting a report cannot be qualified as a party.

#### *Art. 63*            Procedural principles

(Art. 126 para. 1 and 5, Art. 131 let. g, Art. 139 para. 4 and 5 FMIA)

<sup>1</sup> The proceedings shall be straightforward and take account of the short time limits within which the decisions are issued.

<sup>2</sup> The proceedings shall in principle be conducted in writing.

<sup>3</sup> The committee or the President of the Takeover Board shall inform the parties about the progress of the proceedings.

<sup>4</sup> The President of the Takeover Board or the chairperson of the committee may call the parties and the auditor to a meeting. Minutes are to be taken of the deliberations and sent to the involved parties.

<sup>5</sup> The special aspects of the exchange of correspondence are governed by Article 139 paragraph 5 FMIA and Article 8 FMIO-FINMA.

<sup>6</sup> The provisions governing the suspension of time limits do not apply.

<sup>7</sup> The public and the parties shall be excluded from the deliberations of the Takeover Board and its committees.

#### *Art. 64*            Official secrecy

(Art. 126 para. 1 and 5, Art. 131 let. g FMIA)

The Takeover Board and its employees are bound by official secrecy.

#### *Art. 65*            Publications

(Art. 126 para. 1 and 5, Art. 131 let. g FMIA)

<sup>1</sup> The Takeover Board publishes its case law.

<sup>2</sup> It may publish circulars, notices and opinions as required.

#### *Art. 66*            Languages

(Art. 126 para. 1 and 5, Art. 131 let. g FMIA)

<sup>1</sup> The working languages of the Takeover Board are German, French, Italian and English.

<sup>2</sup> The decisions are issued in one of the official languages, normally the language spoken at the Swiss headquarters of the offeree company.

#### *Art. 67*            Time limits

(Art. 126 para. 1 and Art. 131 let. g FMIA)

<sup>1</sup> For the calculation of time limits, Art. 9 FMIO-FINMA shall apply.

<sup>2</sup> An act is carried out on time if it is completed before midnight Swiss time on the last day of the specified period.

*Art. 68*            **Appealing decisions**  
(Art. 140 FMIA)

In accordance with Art. 140 FMIA, an appeal against decisions of the Takeover Board may be filed with the Swiss Financial Market Supervisory Authority (FINMA).

*Art. 69*            *Abrogated*

*Art. 70*            **Regulations**  
(Art. 126 para. 1 and Art. 131 let. g FMIA)

The Takeover Board shall issue its regulations and submit them to FINMA for approval.

### **Chapter 13: Entry into force**

*Art. 71*            **Repeal of current legislation**  
(Art. 126 para. 1 and Art. 131 let. g FMIA)

The Ordinance of the Takeover Board dated 21 July 1997 on Public Takeover Offers is repealed.

*Art. 72*            **Entry into force**  
(Art. 126 para. 1 and Art. 131 let. g FMIA)

This ordinance enters into force on 1 January 2009.