Acquisition of interests in listed companies - the rules on public tender offers and the notification of acquisitions

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TABLE OF CONTENT

Abbreviations:

CO	**Code of Obligations**
FBC	**Federal Banking Commission**
FBC-Ordinance	**Ordinance of the Federal Banking Commission on Stock Exchanges and Securities Trading**
SESTA	**Federal Act on Stock Exchanges and Securities Trading**
SESTO	**Ordinance on Stock Exchanges and Securities Trading**
TOB	**Takeover Board**
TOB-Ordinance	**Ordinance of the Takeover Board on Public Takeover Offers**

THE ACQUISITION OF PARTICIPATION IN LISTED COMPANIES

The Stock Exchange Act and the Ordinances based on the Stock Exchange Act regulate tender offers and the acquisition of major participations in listed companies. These regulations, in particular, oblige the acquiror of a major participation in a listed company to notify the company and the stock market if such participation exceeds certain thresholds, and determine form, content and procedure of public tender offers.

The basic purpose of the regulations on tender offers and acquisitions of interests in listed companies is not to restrict such transaction but to make them transparent for the public. The purpose of the notification obligation is to ensure that the public shareholders know who controls or has substantial influence over a listed company so that they can adapt their own behavior to such new situation. The rules on public tender offer are intended to ensure that the shareholders have all of the information which is necessary to decide on a tender offer and can freely decide on such offer.

A. PUBLIC TENDER OFFER

1. THE APPLICATION OF THE SWISS RULES ON TENDER OFFERS

- *The rules of the Stock Exchange Act on public tender offers are applicable to all Swiss companies which are listed on a Swiss exchange. In principle, they do not apply to foreign companies listed in Switzerland unless the company concerned has its center of management in Switzerland and is exclusively listed in Switzerland.*

- *For the purpose of the Stock Exchange Act, any public offer to purchase shares from an unlimited number of shareholders is considered to be a public tender offer.*

- *The rules on public tender offers also apply to repurchase programs of listed companies; however, the takeover commission grants a partial exemption if a share-buy-back program meets certain conditions.*

- *Even if the rules on public tender offer apply to a company, the company may preclude the application of the rules on mandatory tender offers (obligation of a person who acquires more than 33,33% of a company's shares to launch a public tender offer) by adding a provision to that effect to its articles of incorporation.*

The rules of the Stock Exchange Act on public tender offers apply only if the following conditions are met:

1.1 Swiss Target Company

The Swiss rules on tender offers according to art. 22 SESTA do not apply to foreign companies. For the purpose of the act, foreign companies are companies which are incorporated under foreign law and have their statutory domicile outside Switzerland. Even if a foreign company is exclusively listed in Switzerland the Swiss rules on tender offers do not apply. We find such exclusive Swiss listing, in particular, with Liechtenstein companies that are listed on the SWX main segment and with certain foreign companies listed on the SWX New Market. Since the countries, in which these companies are incorporated often do not have any rules on public tender offers or apply such rules only to companies listed in their respective countries tender offers for such companies often are completely unregulated.

Although the Federal Banking Commission and the Takeover Board maintain the principle that the Swiss tender offer rules apply only to Swiss companies and concede that the tender offers for Liechtenstein companies listed in Switzerland are unregulated, the Federal Banking Commission has held that the Swiss tender offer rules apply to a foreign company if its center of management is located in Switzerland[1].

1.2 Listing on a Swiss exchange

The Swiss tender offer rules apply only if the shares for which a tender offer is launched are listed on a Swiss stock exchange. Tender offer rules do not apply to Swiss companies which are listed exclusively on a foreign exchange such as for example on the German Neuer Markt.

According to art. 2 SESTA, a stock exchange is any organization which is set up for the purpose of securities trading and allows for simultaneous exchange of offers among a number of security dealers as well as the execution of transactions. Therefore all Swiss companies whose shares are listed on the SWX (including regional caps, the SWX new market and the segment for investment companies and real estate companies) or on the Bernese stock exchange are subject to the takeover rules of the Stock Exchange Act. Such takeover rules, however, do not apply to companies which are traded only in the over-the-counter

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[1] For example, the Swiss tender offer rules applied to the tender offer of LVMH for TAG Heuer, because the management of TAG Heuer and its business activities were concentrated in Switzerland although the company was incorporated in another country.

market even if high turnovers are reached in such trading and the prices obtained are regularly published.

1.3 Public Tender Offer

According to art. 2 para.e SESTA, any public offer to purchase or exchange shares, participation certificates or bonus certificates[2] which is made to the holders of such securities is considered a tender offer. The form in which such offer is made is irrelevant in determining whether the tender offer rules apply. Therefore not only formal written offers but also offers which are made known to the public through an informal press release or any other means, are considered tender offers. For the application of the rules on tender offers it also is irrelevant whether a predetermined price is offered; according to the practice of the Commission on Regulatory Issues - the predecessor of today's Takeover Board - a public announcement to purchase during a certain period of time all shares available at the stock exchange would also be considered a tender offer subject to the tender offer rules.

The public announcement is an indispensable element of a public tender offer; if an acquiror systematically buys shares on the stock exchange or in block trades outside the stock exchange, such behavior is not regarded as a public tender offer as long as the acquiror does not publicly solicit the sale of shares. The prior announcement of an intention to launch a public tender offer at a later date[3] is also not considered a public tender offer. However, if such announcement of an intent to launch a tender offer is made in the form of a formal pre-announcement as described in art. 7 TOB-Ordinance, such formal pre-announcement obliges the

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2 Partizipations- oder Genussscheine.

3 Such an announcement is often made if a person acquires a major interest in a listed company and wants to take full control over such company

acquiror to actually launch a tender offer within six weeks after the pre-announcement has been made.

Corporate mergers in the sense of art. 748 seqq. CO are not considered to be tender offers although such a merger has the same economic effect in principle as a tender offer in which the acquiror offers his own shares in exchange of the shares of the target company. When enacting the Stock Exchange Act, apparently the parliament was of the opinion that the corporate law rules on mergers and, in particular, the requirement of a qualified majority[4] and the possibility of challenging a resolution of the shareholders' meeting in court pursuant to art. 706 CO are sufficient to protect the interests of the shareholders.

1.4 Repurchase of Shares

If the company publicly announces its intent to repurchase shares, such repurchase offer is considered to be a public tender offer irrespective of whether the company repurchases shares over a „second line" at the stock exchange, purchases shares directly from shareholders after the announcement, or issues put-options to all its shareholders. However, not all rules on tender offers are applicable to such offers if (i) the company repurchases not more than 10% of its share capital; (ii) the position of the major shareholders is not materially effected by the repurchase offer[5]; (iii) the liquidity of the market is not materially reduced; and (iv) the company concerned has published an annual or semi-annual report within the last 9 months. If these conditions are fulfilled, the repurchase offer is exempt from the strict rules on tender offers and the company does not have to issue a tender offer prospectus. Instead, it is sufficient that the company publishes

4 According to art. 704 CO the consent of two thirds of the votes and 50% of the capital represented at such shareholders' meeting is necessary for a decision in favor pf a merger.

5 i.e. major shareholder does not suddenly have a majority position because 10% of the shares held by the other shareholders are repurchased

an advertisement on the offer in newspapers and electronic media. In the advertisement, the details of the offer such as the number of shares to be repurchased, the price to be paid, and the method of repurchase (block trades, put-options issued to present shareholders or repurchases on a “second line” on the stock exchange) must be described. Furthermore, the advertisement must disclose the purpose for which the company intends to use the shares it has repurchased (covering of options issued to employees, capital reduction, etc.) and confirm that the company does not have any information on its business and finances which are not known to the public and would materially influence the shareholders’ decision on such offer.

1.5 Opting Out - Exclusion on the Rules on Mandatory Tender Offers

According to art. 32 SESTA, a person which directly or indirectly acquires more than 33 1/3 % of the shares of a listed company has to make a tender offer to all shareholders (“mandatory tender offer”)[6]. Swiss companies which are listed on a Swiss stock exchange (and therefore subject to the tender offer rules of the Stock Exchange Act according to art. 22 SESTA) may avoid the rules on mandatory tender offers by adding a clause to such effect to their articles of incorporation (“Opting-Out”).

Such Opting-Out enables the owner of a majority position to sell its shares without obliging the purchaser to make a public tender offer. In economic terms this means that the seller can charge a premium for a controlling interest in a listed company without sharing such premium with the public shareholders.

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6 see para. A.7 below

Although an Opting-Out clause due to its economic effect should result in a lower valuation of the shares concerned there is not statistical evidence of a systematically lower valuation of companies which have an Opting-Out clause.

2. THE PUBLIC TENDER OFFER

- *The tender offer can be made for part or all of the outstanding shares; if the acquiror, however, offers to purchase more than 33 1/3% of the shares, the tender offer must be made for all outstanding shares (Even in such a case a partial offer may, however, be made if the target's articles of incorporation contain an Opting-Out clause).*

- *The offeror is free to determine the purchase price; if the offeror offers to buy more than 33 1/3%, the provisions on mandatory tender offers apply so that the tender offer price must at least be equal to the stock market price at the time the offer is made and may not be lower than 75% of the highest price the acquiror has paid in the preceding 12 months (these rules, however, do not apply if the target company's articles of incorporation contain an opting-out clause). In any case the acquiror has to respect the principle of equal treatment; he must offer the same price to all shareholders (if the offer encompasses several categories of equity securities, the prices for these categories may be differentiated in accordance with the different rights of such securities).*

- *An offer can also provide for the exchange of securities; however, if the securities offered in the exchange are not listed on a stock exchange, a valuation must be provided in the tender of a prospectus.*

- *An offer may be subject to conditions (consent of merger control authorities etc.). However, conditions the fulfillment of which can be influenced to a large extent by the offeror are not admitted. The financing of the offer must be secured before the offers is made and may therefore not be a condition to which the offer is subject.*

- *Once a tender offer has been published, it may only be changed in favor of the shareholders.*

2.1 Extent of the Offer

In principle the offeror is free to determine how many shares he wants to buy in a tender offer. A tender offer may therefore be limited to a part of the target company's shares. Howevere, if the offeror receives acceptances for more shares than he offered to buy, he must purchase the shares on a pro-rata basis in accordance with art. 10 para. 4 TOB-Ordinance; the offeror may not accept the shares tendered on the basis of a "first come first serve" policy, since such acceptance would give shareholders an incentive to tender as fast as possible without analyzing the offer carefully.

If the target company has listed several classes of equity security (bearer shares, registered shares, participation certificates) the offer must cover all classes of listed securities. Therefore the offeror may not limit the offer to a class of equity securities as, for example, to shares with privileged voting rights. The tender offer however, according to art. 10 para. 2 TOB-Ordinance, does not have to cover non-listed equity securities. If a target, for example, company has both bearer shares and registered shares but only the registered shares are listed on the stock exchange, the offeror may be limited to such bearer shares.

If the tender offer covers such number of shares that the offeror - in case the offer is successful - owns a number of shares that forces the acquiror according to art. 32 SESTA to make an offer to the remaining shareholders, the offer may not be limited to a part of the shares but must from the beginning cover all listed equity securities of the target company. Therefore a partial offer is not possible if the number of shares covered by such partial offer, together with the shares already owned by the offeror exceeds 33 1/3% of the voting rights of the company (or a higher percentage if the target company has increased the limit for mandatory tender offers in its articles with a “opting-up clause”[7]). Partial tender offers which exceed the limit for mandatory tender offers are only possible if the target company has excluded the application of the rules on mandatory tender offers with an “Opting-Out clause” in its articles of incorporation[8]; in such case the acquiror may make a partial tender offer for any part of the company’s shares.

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[7] see para. A.7.5 below

[8] see para. A.7.5 below.

2.2 Tender Offer Price

The Swiss tender offer rules do not require that a specific or an „appropriate“ price be paid for the shares to be purchased. Consequently shareholders have no possibility of challenging the price offered by the tender offeror in a legal procedure. The offeror is free to determine the tender offer price. The offeror, however, is bound by the principle of equal treatment set forth in para. 2.4 below.

Art. 32 para. 4 SESTA contains certain rules on the price to be offered in a mandatory tender offer i.e. in a situation where the acquisition of more than a 33 1/3% interest creates an obligation to submit a tender offer for all outstanding shares[9]. According to art. 10 para. 5 of the TOB-Ordinance such rules apply in general to all tender offers in which the acquiror, if the tender offer is successful, acquires such number of shares that the acquiror together with the shares it holds before the tender offer is launched, owns more than 33 1/3% of the votes in the target company. If the articles of incorporation of the target company however contain an “Opting-Out” clause which has raised the threshold for mandatory tender offer to up to 49%[10], these rules on prices of mandatory tender offers apply only if the acquiror would meet this higher threshold after a successful tender. The rules on prices to be offered in a mandatory tender offer are not applied at all if the target company’s articles of incorporation contain an Opting-Out clause[11] which exempts such company from the rules on mandatory tender offers.

If the rules on mandatory tender offers apply, the price offered in the tender offer must adhere to the following rules:

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9 see para. A.7 below.

10 see para. A.7.5 below on „Opting-Out“

11 see para. A.7.5 below on „Opting-Out“

- The price offered must at least be equal to the average of the opening prices achieved in the 30 stock market days preceding the launch of the tender offer.

- The price offered must be at least 75% of the highest price the acquiror has paid within the 12 months preceding the launch of the tender offer.

2.3 Exchange Offers

The acquiror may offer securities, i.e. shares, bonds or options instead of cash in exchange for the equity securities the acquiror intends to purchase with the tender offer. The acquiror may also offer any combination of such securities and of cash. For the shareholders of the target company in particular, a combination of cash and options in the acquiror’s shares may be attractive as with such combination it is possible to combine the security of a cash price with the upside on option offers.

According to art. 24 TOB-Ordinance, the tender offer prospectus for an exchange offer must contain a detailed description of the rights the securities offered by the acquiror convey to their owners. If the securities offered by the acquiror are not listed on the main segment of a stock exchange, the special auditors who review the tender offer must assess the value of such securities. Although art. 24 TOB-Ordinance requires the listing in the main segment of a stock exchange, I am of the opinion that a listing on any of the segments of the SWX (main segment, SWX New Market, SWX Regional Cap, investment companies and real estate companies) is sufficient since the companies listed on such segments have the same information obligations as the companies listed on the main segment of the SWX[12]. For securities which are traded only over the counter or are listed on a

[12] to companies listed on the SWX New Market even stricter rules apply

stock exchange only after the tender offer has been completed, a valuation by the auditors appointed for the offer will be necessary.

If securities listed outside Switzerland are offered in an exchange offer, no valuation is necessary if the issuer of such securities has information obligations (pursuant to the applicable foreign listing regulations) towards the holders of such securities which are at least as stringent as the listing regulations of the SWX main segment.

If the shares offered in the exchange are economically identical to the shares of the target company, the Takeover Board will grant an exemption from the required publication of a valuation in the tender offer prospectus. Such exemption would be granted if the acquiring company is a holding company which has no activities outside the target company and offers newly created shares in exchange for shares in the target company.

2.4 Equal Treatment

According to art. 24 para. 2 SESTA the acquiror must treat all the owners of a certain class of securities equally in its offer and, in particular, has to offer all owners. Should the acquiror pay one shareholder a higher price than to the others while the offer is pending the acquiror will be required to pay such price to all shareholders[13]. If a tender offer covers various classes of equity securities, the acquiror may differentiate prices as long as there is a reasonable relation between prices offered and the different tights of such classes of equity securities[14]. This means that prices may be differentiated only to the extent that different classes of shares actually represent different legal positions. It is therefore possible to offer

[13] Art. 10 para. 4 UEV-UEK.
[14] Art. 10, para. 4 TOB-Ordinance.

higher prices to shares with privileged voting rights *("Stimmrechtsaktien")* or preferred shares *("Vorzugsaktien").* In view of these requirements, an offeror who intends to differentiate prices between classes has to objectively assess the value of these special rights. The basis of such valuation is normally the historical valuation by the stock market which gives a clear indication as to the market valuation of different rights. If one or more of the categories is not listed, such a direct reference to the stock market valuation is not possible. However, sometimes it is possible to evaluate different rights on the basis of valuation differences of other listed companies which have a similar capital structure.

2.5 Conditions

A tender offer may be subject to certain conditions. According to art. 13 para. 1 TOB-Ordinance, the acquiror may, however, subject its offer only to conditions which he can not materially influence. In practice tender offers are normally subject to one or several of the following conditions:

- **Acceptance of the tender offer for a minimum number of shares**

  Normally a public tender offer is subject to the condition that it is accepted for a minimum number of shares. It is quite common to subject a takeover offer to the acceptance of the offer for at least 50% or 66 2/3 % of the shares since such stake in the company ensures control over the target company. Often a tender offer is also made subject to the condition that it is accepted for at least 98% of the shares as an acquiror who owns such number of shares can squeeze out the existing shareholders and thus gain complete control over the target company.

- Consent of the Target Company’s Shareholders’ Meeting to Changes in the Articles of Incorporation

If the target company’s articles of incorporation contain provisions which prevent the acquiror from taking over control of such company, e.g., transfer restrictions or voting rights limitations[15], such provisions must be deleted by the shareholders’ meeting of the target company to ensure the success of a tender offer. In such a situation the acquiror will subject the tender offer to the condition that the shareholders’ meeting deletes such clauses from the company’s articles of incorporation. With such a condition the acquiror puts pressure on the shareholders who want to benefit from the offer to vote for the deletion of the pertinent clauses from the articles of incorporation in the shareholders’ meeting.

Neither the Swiss Code of Obligation nor the Stock Exchange Act directly grant a tender offeror the right to call for a shareholders’ meeting because he has launched a tender offer. In a friendly takeover, the target company’s board of directors will call for a shareholders’ meeting and propose the deletion of such provisions from the articles of incorporation. However, in an unfriendly situation the acquiror itself has to ensure that a shareholders’ meeting is called. According to art. 699 para. CO, shareholders who hold at least 10% of the shares can demand that an extraordinary shareholders’ meeting be held and that the deletion of the clauses concerned from the articles of incorporation be voted upon at such shareholders’ meeting. An acquiror in a hostile situation therefore has to either acquire 10% of the shares to ask the target company’s board of directors to call such a shareholders’ meeting or encourage shareholders who are interested in a tender offer and collectively hold at least 10% to make such a demand.

15 Cf. para. A.8.2 below.

- **Merger Control Clearance**

  If according to the applicable anti-trust law, a takeover is only possible after the merger control authorities have consented to the planned tender offer, the tender offer must be subject to the condition that such consent is obtained.

In principle there are further conditions possible which refer for example to the development of certain interest rates or stock market indices which allow the acquiror to withdraw in case of a materially negative change in the capital markets. It is, however, not possible to subject the offer to a general material adverse change clause as under such clause the acquiror has too much discretion to withdraw the offer. It is also not possible to subject the offer to the condition that the acquiror obtains adequate financing. Financing must be arranged before the tender offer is launched and the availability of the funds must examined by the special auditors to the tender offer.

It is also not possible to subject the tender offer to the satisfactory conclusion of the due diligence by the acquiror on the target company as such condition would subject the transaction entirely to the decision of the purchaser.

The purchaser may at any time waive any condition to which the offer is subject as this is a change in the offer which is beneficial to the shareholders of the target and which therefore is possible according to art. 15 TOB-Ordinance[16].

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[16] Naturally the acquiror cannot waive any conditions regarding merger control as such conditions are imposed by applicable law.

A tender offer can, in principle, be subject only to conditions precedent, i.e. conditions that can be fulfilled before the expiry of the acceptance period. If, however, the fulfillment of a condition such as merger control clearance cannot be achieved during the term for the acceptance of the offer, such a condition precedent can be converted in a condition subsequent, the acceptance of the offer by the shareholders who have accepted the offer is then subject to such a condition. As such conditions subsequent extends the whole tender offer procedure and also create a high degree of uncertainty for the shareholder the Takeover Board allows such conditions only if it is not possible to fulfill the condition concerned during the term of the offer.

2.6 Financing of the Offer

At the time the acquiror launches the tender offer such transaction must be fully financed by the means of the acquiror or by credit commitments of banks. The special auditor who examines the tender offer pursuant to art. 17 para. 2 TOB-Ordinance also examines the financing of the tender offer and must confirm the existence of adequate financing[17].

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[17] Cf. Para. A.3.2.2 below.

2.7 Changes in the Offer

According to art. 15 TOB-Ordinance the terms of a public tender offer may be changed by the offeror after the launch of the offer only as long as the change concerned is favorable for the shareholders. The offeror, therefore, may waive conditions or increase the tender offer price. Changes in the terms which are negative for the shareholders as for example the inclusion of additional conditions or a decrease in the purchase price are not permitted.

Any change in the terms of the tender offer must be communicated to the shareholders in the same form as the original tender offer. Any changes communicated within ten stock market days before the expiry of the tender offer period lead to an extension of the acceptance deadline by a further ten stock market days. In principle, changes in the terms of a tender offer are possible only until the expiry of the tender offer period. However, even after the expiry of such period the offeror can unilaterally change the terms of the offer by waiving conditions to which the offer was subject; in fact, such waiver is often made at the time the acquiror publishes the results of the tender offer and communicates to the shareholders of the target company whether the tender offer has been successful[18].

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[18] See para. A.5.2 below.

3. TENDER OFFER PROSPECTUS

- *The tender offer prospectus must contain the information which is necessary for the investor to assess the advantages and disadvantages of the tender offer; in particular, the prospectus must contain information on the acquiror, the financing of the offer, the object of the offer and the offer price. Furthermore, the acquiror has to disclose its intentions with respect to the future management of the target company. In the offer prospectus the acquiror must also confirm that it has no non-public information on the target which could be material for the shareholders of the target company. If the acquiror has any such information, this information must be disclosed before the tender offer is launched.*

- *Before the offer is launched the tender offer prospectus has to be reviewed by a special auditor; in practice, the tender offer prospectus is also submitted to the Takeover Board for an informal review.*

- *The tender offer prospectus must be published in German and French.*

- *It is possible to publish a formal pre-announcement of the tender offer; this has the advantage of limiting the defense measures available to the target company and fixing the minimum offer price on the date of the publication. However, the offeror has to launch the tender offer within six months after the pre-announcement has been published.*

According to art. 24 para. 1 SESTA the acquiror has to publish a tender offer prospectus which contains all information which is necessary for the investor to assess the tender offer. The information contained in the tender offer prospectus must be true and complete so that the shareholders of the target company can decide on the offer on a fully informed basis.

3.1 Content of the Tender Offer Prospectus

The tender offer prospectus must contain at least the information described in art. 19 seq. TOB-Ordinance. In particular, it must contain the following information:

3.1.1 Information on the Acquiror

According to art. 19 TOB-Ordinance, the name, the domicile, the capital and the main business activities of the acquiror have to disclosed and the acquiror has to inform the public where investors can obtain its last annual report. Furthermore, the shareholders who directly or indirectly control the acquiror must be disclosed together with all persons acting collectively with the acquiror in the acquisition of the shares in the tender offer[19].

3.1.2 Shareholdings of the Acquiror

According to art. 19 para. 1 lit. f and g TOB-Ordinance the acquiror must disclose in the tender offer prospectus its present participation in the target and the number of equity securities of the target company the acquiror has purchased in the last twelve months before the tender offer is launched. The prices paid in single transactions do not need to be disclosed; however, the highest price paid by the acquiror during such period must be published in the prospectus as this price is the basis for the calculation of the minimum price for mandatory tender offers pursuant to art. 32 para. 4 SESTA.

3.1.3 Financing of the Tender Offer

Pursuant to art. 20 TOB-Ordinance the acquiror must describe how the offer is financed. In particular, the acquiror has to disclose whether the offer is financed by cash available to the acquiror or by loans obtained from third parties. It is

[19] In particular, it is necessary to list persons who have already agreed to sell their shares in the public tender offer or who will not deliver such shares but continue to jointly hold them to control the target company after the tender offer together with the acquiror.

sufficient to disclose the method of financing without specifying the parties involved, i.e. the names of the lending banks do not need to be disclosed.

If an exchange offer is made, the tender offer prospectus must describe the source of the securities which are offered for exchange, i.e. disclose whether treasury shares or authorized capital which that be issued by the acquiror board of directors shall be used, or whether a decision of the shareholders' meeting of the acquiror is necessary to increase its capital. In the latter case the acquiror must confirm that it has taken all steps necessary to make such capital increase and has already called for a shareholders' meeting and submitted to such meeting a motion to increase the company's capital[20].

3.1.4 Object and Price of the Offer

The tender offer prospectus must specify how many shares the offeror intends to purchase and whether the offer is limited to certain classes of shares[21]. If the acquiror makes only a partial offer and does not intend to acquire all shares of the target company, the tender offer prospectus must specify the maximum number the acquiror intends to purchase.

The price to be paid must be clearly specified for each category of equity securities which is subject to the tender offer.

If different prices will be paid for different classes of securities, the tender offer prospectus must describe the basis of the price differentiation. Such explanations are not problematic if the different prices are caused by different nominal values.

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[20] In such cases the offeror naturally can not guarantee that the shareholders actually vote in favor of the capital increase; the tender offer, therefore, must be subject to the condition that the shareholders' meeting actually increases the offeror's capital, cf. para. A.2.5 above.

[21] As shown in para. A.2.1 only non-listed equity securities may be excluded from a tender offer.

More difficult is a price differentiation on the basis of different rights i.e. if the prices compensate for special financial or voting rights of certain classes of shares. In such case the differentiation must be explained on the basis of the principle of equality described in para. 2.4 above and the valuation of the rights compensated by higher prices must be explained in detail.

3.1.5 Information on the Target Company

The tender offer prospectus must contain the following information on the target company:

- **Future plans of the Acquiror:**

  The acquiror must disclose his future plans for the target company in the tender offer. In particular the acquiror must inform the public whether it intends to continue the business of the target company or whether it intends to liquidate or merge with another company. The acquiror must also inform the public about the dividend policy it intends to pursue with the target company as this issue is important for shareholders in deciding whether to keep or sell their shares. Similarly, if the acquiror intends to delist the target company's shares from the stock exchange if the offer is successful, this intent must also be disclosed[22].

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[22] The announcement of discontinuing dividend payments as well as the threat of delisting the shares after a successful tender offer serve as a strong incentive for shareholders to sell their shares in the tender offer.

- **Agreements between the Acquiror and the Target Company, its Corporate Bodies and Shareholders**

The acquiror has to disclose in the tender offer any agreements concluded between the acquiror and the target company, directors, managers or shareholders of the target company. Although art. 23 TOB-Ordinance refers to all agreements between such parties, the disclosure obligation is limited to agreements which refer to the intended or relevant transaction or are relevant to it. Supply agreements between acquiror and the target company which have no material significance to the takeover bid, therefore, do not have to be mentioned. The following agreements however have to be disclosed:

- Any „takeover agreements“ between target companies and acquiror; in a friendly acquisition, acquiror and target company usually conclude agreements which describe the essential elements of the takeover and the integration of the target[23]. It is relevant for the shareholders to see whether the acquiror has made any promises to the board of the directors or the management of the company in such agreements.

- Agreements with shareholders of the target company to sell their shares to the acquiror.

- Agreements between the acquiror on one hand and directors or managers of the target company on the other hand on the continued employment of such persons or on severance payments.

[23] cf. para A.9 below.

- **Confirmation Regarding Non-public Information**

According to art. 23 para. 2 TOB-Ordinance, the acquiror has to confirm in the takeover prospectus that it has no non-public information on the target company which could materially influence the decision of the target company's shareholders on the tender offer. If the target company has allowed the acquiror to conduct a due diligence before the launch of the tender offer and if the acquiror in such due diligence has obtained new information which is unknown to the public, such information has to be disclosed to the public by the company before the tender offer is launched or alternatively has to be disclosed directly in the tender offer prospectus. Such disclosure is also necessary if a representative of the offeror is a member of the target company's board of directors and therefore has received balance sheets or other similar information which is not known to the public. In such case, the representative's knowledge is attributed to the offeror and consequently has to be disclosed to the public.

3.1.6 Special Disclosure in Case of Exchange Offers

The securities offered by the acquiror and all rights pertaining to such securities must be described in detail[24] in the tender offer prospectus. In such case the tender offer prospectus must also inform the shareholders where the last three annual reports of the issuer of such securities can be obtained. Furthermore the tender offer prospectus must inform the shareholders on any changes in the financial position and in the business of the issuer that have occurred since the last annual or interim report. The shareholders of the target company must

[24] art. 24 TOB-Ordinance

effectively receive all information that is necessary to determine the value of the securities that are offered by the issuer.

If the securities offered by the acquiror are listed on a stock exchange, the tender offer prospectus must describe the development of such securities' prices over the last three years. As described in para. 2.3 above the tender offer prospectus must contain a valuation of the securities offered by the acquiror if such securities are not listed on the main segment of a stock exchange.

If the securities offered in exchange for the target equity securities are to be listed upon their issuance on the SWX, the issuer has to publish – in addition to the tender offer prospectus - a full listing prospectus that complies with the listing requirements of the SWX.

3.2 Review of the Tender Offer Prospectus

3.2.1 Review by Auditor

Before a tender offer prospectus is published, it has to be reviewed by an auditor *(„Prüfstelle“).* Any security dealer licensed under the stock exchange act and any accounting firms qualified as auditors for the audit of security dealers pursuant to art. 18 SESTA may act as auditors to a tender offer. In practice, however, only accounting firms act as auditors as the type of review to be conducted is closer to their business than to the business of a security dealer.

According to art. 27 TOB-Ordinance the auditor has to examine whether the tender offer prospectus complies with applicable law. In particular the auditor has to examine whether the information contained in the tender offer prospectus is complete and accurate. In order to conduct such review the auditor will conduct a due diligence; after having received a draft of the tender offer prospectus the auditor will send to the acquiror a checklist which lists all documents and information which are necessary to verify the content of the tender offer prospectus. In such due diligence the auditor must, in particular, also examine the financing of the tender offer. In the event the acquiror finances the purchase with its own funds the auditor examines the valuability of such funds. In the event the acquisition is financed with loans, the auditor examines the loan commitments of the lending banks. In view of the fact that the financing of the offer must be secured at the time the tender offer is launched such commitments must be unconditional and must cover the total amount of financing required.

The auditor reviewing the offer must also examine whether all recipients of the offer are treated equally. In particular he must examine whether price differentiations between different classes of equity securities can be justified in view of the acquiror’s obligation to treat all shareholders of the target company equally. In such case the auditor must examine whether the different rights of such securities have been properly valued as described in para. A.2.4 above.

If the audit is satisfactory the auditor will issue a short report which has to be included in the tender offer prospectus.

3.2.2 Informal Review by the Takeover Board

The tender offer prospectus does not need to be submitted to the Takeover Board for examination before the tender offer is launched; according to art. 17 para. 2 TOB-Ordinance it is sufficient to submit the final prospectus to the Takeover Board on the day it is published. In practice, however, acquirors regularly submit draft prospectuses to the Takeover Board for an informal examination in order to avoid the possibility of an objection by the Takeover Board after the prospectus has already been published. In order to avoid the problems which such objection would cause (namely the publication of a rectified prospectus) the draft of the tender offer should be submitted to the Takeover Board about 10 days before it is published. On this basis the final prospectus can then be submitted to the Takeover Board for a final review one or two days before it is printed[25]. Such procedure not only avoids unpleasant surprises with later objection by the Takeover Board but also has the advantage that according to art. 14 para. 2 TOB-Ordinance the cooling-off period of 10 days between the publication of the tender offer and the beginning of the acceptance period is waived if the report of the board of directors of the target company is published in the prospectus itself and thus can be submitted to the Takeover Board at the same time as the final draft of the prospectus.

The Takeover Board is also willing to discuss any legal issues before a tender offer is launched so that any insecurities in connection with the application of the rules on tender offer and tender offer prospectuses can be eliminated before the tender offer prospectus is published.

3.3 Publication of the Tender Offer Prospectus

According to art. 18 TOB-Ordinance the tender offer prospectus must be published in German and French. In practice, tender offer prospectuses are nearly always also published in English so that most of the tender offer prospectuses are published in three languages. According to art. 18 TOB-Ordinance neither the French nor the German text take preference; Therefore the French and the German versions must be meticulously examined to avoid any discrepancies in

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25 If such tight schedules are used it is very important that the dates at which a draft and the final version are submitted to the takeover board are agreed upon with the Takeover Board beforehand.

content. If they deviate from each other, the version which is more favorable for the shareholders of the target company is applied.

The prospectus must be published in at least two newspapers: in the German and the French speaking parts of Switzerland and in at least one electronic medium which distributes stock market information (Reuters, Bloomberg, etc.).

3.4 Pre-announcement of a Tender Offer

According to art. 7 TOB-Ordinance the offeror may publish a formal pre-announcement before the actual launch of a tender offer. In such pre-announcement the offeror summarizes the main points of the tender offer, particularly the price, the period in which the offer remains open and the conditions to which the offer is subject. If such a formal pre-announcement is published, the acquiror must launch a tender offer within six weeks after the publication of the pre-announcement. The terms and conditions of such tender offer may deviate from the pre-announcement only to the extent such deviations are to the benefit of the target company's shareholders, e.g., waiving a condition which was mentioned in the pre-announcement. However, according to art. 9 para. 2 TOB-Ordinance the acquiror may decrease the price if the acquiror has conducted a due diligence review between the pre-announcement and the launch of the tender offer and if such due diligence review has led to the discovery of facts which are relevant to the valuation of the company and were unknown to the acquiror[26].

[26] according to art. 23 para. 2 TOB-Ordinance such facts must be disclosed to the public as otherwise the acquiror can not confirm in the tender offer prospectus that he has no knowledge on material information that is unknown to the public.

If the acquiror has published a formal pre-announcement, the price of the securities concerned at the time such tender offer is published is decisive for the determination of the minimal price for a mandatory tender offer in accordance with art. 32 SESTA[27]. An increase of the stock market price after the publication of the pre-announcement therefore does not force the acquiror to increase the price offered to the public shareholders. If a formal pre-announcement is made, the rules of the stock exchange act limiting the defense measures the target company may take are immediately applied. This can be decisive for the success of a tender offer as the target company after such publication may in particular not conclude any lock-up agreements with third companies[28].

If an acquiror intends to inform the public in an informal media release that it plans to launch a tender offer but does not want the binding effect of a formal pre-announcement, the acquiror must ensure that such public information can only be interpreted as an expression of an intent. For that purpose the acquiror should in the text of the media release clearly exclude any binding effect and explicitly state that the media release made by the acquiror can not be construed as a formal pre-announcement pursuant to art. 7 TOB-Ordinance.

27 Cf. Para. A.7 below.
28 cf. for defense measures and their limitations para. 7.

4. OBLIGATIONS OF THE TARGET COMPANY

- *The board of directors of the target company has to issue a report to its shareholders. In such a report the board of directors has to either recommend acceptance or rejection of the offer or discuss the advantages and disadvantages of the offer without making a recommendation. Furthermore, the board of directors has to disclose any conflicts of interest and any defense measures it intends to take.*

- *From the moment an offer is published until the result is announced, the target company may not enter into any transactions which would significantly alter the assets or liabilities of the company and may not grant board members or officers any excessive severance packages. The target company has to treat competing offers equally and must grant all potential acquirors the same information. If one acquiror is permitted to conduct a due diligence, all competing bidders must have the same right.*

4.1 Report of the Target Company's Board of Directors

According art. 29 SESTA the board of directors of the target company must issue a report on the tender offer. The purpose of such report is to provide shareholders with the target company's perspective so that they have complete information in evaluating the offer.

4.1.1 Content of the Report

According to art. 29 TOB-Ordinance the report of the board of directors must contain all information which – in addition to the information contained in the tender offer prospectus – is necessary to enable the shareholders of the target company to make an informed decision on the offer. The report, therefore, has to complete any material information gaps left in the tender offer prospectus. According to art. 30 seq. TOB-Ordinance the report must in any event contain the following information:

- **Intentions of Major Shareholders**

  The board of directors has to disclose which shareholders who own more than 5 % of the voting rights have decided to accept the offer. Naturally the board of directors can only make any statements in this regard if such shareholders have decided to inform the board.

- **Defense Measure**

  The board of directors of the target company has to inform the shareholders which takeover defense measures the target company intends to take. In particular, the board of directors has to inform the shareholders whether the board intends to enforce existing transfer or voting restrictions[29] against the acquiror.

- **Conflicts of Interest**

  According to art. 31 TOB-Ordinance the target company's board of directors has to disclose any conflicts of interest its members may have. The board of directors, therefore, has to disclose any agreements or assurances the board members or officers have received with regard to their further employment if such agreements or assurances have not already been disclosed in the tender offer prospectus itself.

4.1.2 Recommendation of the Board of Directors / Fairness Opinion

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[29] Cf. para. A.8.2 below.

In its report, the target company's board of directors may make a recommendation to the target company's shareholders on whether to accept or reject the tender offer. The board of directors may also refrain from issuing a recommendation to the shareholder. In such case the report must discuss the advantages and disadvantages of the tender offer in a neutral manner.

The board of directors has to state the reasons for any recommendation it issues to the shareholders. If the board of directors recommends that shareholders accept the offer, the board of directors will need to emphasize the advantages the company and the shareholders will gain from the transaction. If the board, however, recommends that shareholders reject the offer the board, will need to describe the target company's planned development and stress that the expected gains in shareholder value substantially exceed the short term gain that can be realized by accepting the offer.

The recommendation of the board of directors is normally based on a comparison between the price offered by the acquiror and the target company's value as perceived by the board of directors. In order to be able to make an informed judgment on the relation between offer price and value of the target company, the board of directors will usually retain the services of an investment bank. If the board of directors in a friendly transaction recommends that the shareholders accept the acquiror's offer, such recommendation is usually based not only on a valuation by an investment bank but also on a "fairness opinion" of the investment bank retained by the target company's board of directors. In such fairness opinion the target company's investment bankers confirm that the offer of the acquiror is "fair", i.e. properly reflects the current value of the target company. If the board of directors bases its recommendation on such a fairness opinion and mentions the fairness opinion in its report, the fairness opinion itself must be published as an attachment to the report of the target company’s board of directors.

Fairness opinions are not a requirement of the rules on tender offers. However, if the target company’s board of directors bases its recommendation on the tender offer on a fairness opinion, the use of an expert opinion protects the board from allegations of the shareholders that it did not diligently weigh the advantages and disadvantages of a tender offer.

4.1.3 Publication of the Report of the Board of Directors

The report of the board of directors may be published directly in the tender offer prospectus. Normally, such manner of publication is only seen with “friendly” offers where acquiror and target company have agreed on the terms of the tender offer. If the report of the target company’s board of directors is not published in the tender offer prospectus such report[30] has to be published not later than the 15th stock market day after the tender offer prospectus has been published. The report of the target company’s board of directors has to be published in at least two newspapers[31] and in one electronic medium that distributes stock market information. The publication can be limited to a summary; in such case the publication must, however, indicate where the shareholders may obtain the complete report.

[30] Art. 32 TOB-Ordinance.
[31] In the German and the French speaking part of Switzerland.

4.2 Restriction on Defense Measures

In principle, the target company can in case of a tender offer use all counter measures provided for in its articles of incorporation[32]. The target company may, in particular, invoke transfer restrictions against the acquiror and limitations on voting rights to the extent the target company's articles of incorporation contain such restrictions. However, the target company may[33] from the date the tender offer is published[34] until the publication of the final result not engage in any transactions which significantly alter assets and liabilities of the company. According to art. 35 TOB-Ordinance the following transactions are considered to be significant alterations in assets and liabilities which are prohibited under art. 29 SESTA:

- The sale or acquisition of assets with a value or price of more than 10 % of the target company's consolidated gross assets; this includes also the grant of put or call options for such assets.

- The sale or pledge of any assets or intellectual property which the acquiror in the tender offer prospectus has specifically designated as the main object of its tender offer. Therefore, an acquiror can protect certain assets from being sold during the offer period by mentioning them in the tender offer prospectus; this ensures that if the tender offer is successful, the acquiror obtains the company with such assets.

- The conclusion of contracts with members of the board of directors or senior management providing for unusually high compensation payments in the event their employment agreement with the company is terminated ("golden

[32] Cf. para. A.8.2 below.
[33] Art. 29 SESTA.
[34] Or from the date a formal pre-announcement is published.

parachute”). This does not prohibit the company from concluding agreements on severance payments; as long as such agreements provide for severance payments within the range of 1 to 3 yearly salaries and the aggregate of the severance payments has no material influence on the takeover price or the attractiveness of the company, such agreements do not work as defense measures but only protect individually certain directors or senior managers in a manual that is usual by the standards of listed companies. Such protection of the senior managers and directors who negotiate the terms of the tender offer with an acquiror or who are directly responsible for defense measures is in my view possible and normally also in the best interest of the target company. Without protection, such persons are in a conflict of interest as their future employment by the target company depends entirely on their behavior toward the acquiror. A reasonable protection and appropriate financial incentives ensure, however, that they safeguard the interest of the target company and its shareholders in such negotiations.

- The issue of shares on the basis of the company’s authorized capital without preemptive subscription rights of the shareholders (unless the decision of the shareholders’ meeting which has created the authorized capital expressly allows the issuance of shares in the case of a tender offer). This prohibition, which also extends to the issuance of options and conversion rights, prevents the board of directors of the target company from using such authorized capital to place shares in “friendly hands” in order to prevent a success of the tender offer. Although art. 35 TOB-Ordinance does not expressly refer to treasury shares or shares the company has placed with third parties on a fiduciary basis (“*Vorratsaktien*”), this prohibition also extends in my opinion to such shares as the sale of such shares has the same effect as the issuance of shares on the basis of authorized capital.

The decisions of the shareholders' meeting are not subject to the restrictions of art. 29 SESTA; transactions that are based on decisions of the shareholders' meeting may therefore be carried out regardless of whether such decision has been taken before or after the launch of the tender offer. If, for example, the shareholders' meeting has decided to change of the company's purpose and to sell a part of the company's business, the board of directors may carry out such sale even if the decision of the shareholders' meeting is made before a tender offer is launched. Furthermore art. 29 SESTA does not prevent the target company from carrying out transactions on which contracts were concluded before the launch of a tender offer. For example, if the target company concluded a purchase agreement on the sale of a major part of its business before a tender offer was launched, art. 29 SESTA does not block the target company from consummating such transaction after the launch of a tender offer even if assets and liabilities by such transaction are altered beyond the limits allowed under art. 35 TOB-Ordinance.

4.3 Equal Treatment of Competing Offers

According to art. 48 TOB-Ordinance the target company has to treat competing offers equally by giving all bidders access to the same information. Therefore, if a target company allows one acquiror to conduct a due diligence or otherwise discloses non-public documents and information to such acquiror, the target company has to furnish the same information to any other potential acquiror which makes a competing offer.

The Takeover Board may grant exemptions from the requirement of equal treatment if the target company can show an overriding corporate interest against full disclosure to a competing bidder. Although the wish of the target company's board of directors to be taken over by a specific acquiror does not constitute a sufficient corporate interest, the protection of business secrets may justify an exemption. If a competing offeror – contrary to the original offeror – is a competitor, the Takeover Board should be able to grant an equal treatment exemption by allowing the target company to withhold sensitive business secrets from the competing offeror in spite of the fact that it has disclosed such information to the original offeror.

5. PROCEDURE AND DEADLINES

- *The acceptance period begins 10 days after the publication of the tender offer prospectus. The requirement of a 10 day cooling-off period may be waived by the TOB if the offer has been submitted to the TOB for review before it has published and if the report of the target company's board of directors is included in the tender offer prospectus.*

- *The acceptance period is determined by the acquiror; the minimum acceptance period is 20, the maximum is 40 stock market days.*

- *After the expiry of the acceptance period the acquiror must publish the result of the tender offer and declare whether the conditions to which the tender offer was subject have been fulfilled or whether he waives any unfulfilled conditions.*

- *If the tender offer was successful i.e. if the conditions to which it was subject have been fulfilled the acquiror has to grant the shareholders of the target company a grace period of 10 days to tender any still outstanding shares.*

- *If the acquiror after the expiry of the grace period owns more than 98% of the voting rights of the target company the acquiror can demand that the remaining shares are cancelled and reissued to the acquiror against payment of the tender offer price.*

5.1 Acceptance Period

The shareholders of the target company may accept the tender offer only after the expiry of a cooling-off period of 10 stock market days after the tender offer prospectus has been published[35]. Such cooling-off period is designed to give the target company the opportunity to react to the offer and to prepare the report of the target company's board of directors (which has to be published within 15 stock market days after the publication of the tender offer)[36]. If the acquiror, however, submits the tender offer prospectus together with the report of the target company's board of directors to the Takeover Board for review before such tender offer prospectus is published, the Takeover Board will waive the

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[35] Art. 14 para. TOB-Ordinance.
[36] Art. 32 TOB-Ordinance.

requirement of the cooling-off period so that the acceptance period may start immediately after the publication of the tender offer prospectus[37]. According to art. 14 para. 3 and 4 TOB-Ordinance the tender offer has to remain open for acceptance for a period of at least 20 and not more than 40 stock market days. Such acceptance period may however be reduced to 10 stock market days if the acquiror already owns the majority of the voting rights in the target company before the publication of the tender offer. If the acquiror has set an acceptance period of less than 40 stock market days, it may in the tender offer reserve its right to extend the tender offer period to 40 days.

5.2 Publication of Interim Result

According to art. 27 para. 1 SESTA the acquiror has to publish the results of the tender offer upon the expiry of the acceptance period and to state whether the conditions to which the offeror is subject have been fulfilled.

According to art. 43 TOB-Ordinance a preliminary interim result must be communicated to the Takeover Board and published in at least one electronic media on the first stock market day after the expiry of the tender offer period. No later than 4 stock market days after the expiry of the acceptance period, the exact result has to be published in the newspapers and the electronic media in which the tender offer prospectus was published. The result report must specify the number of shares tendered as well as the number of shares and the percentage interest the acquiror owns after the tender offer. Furthermore the acquiror has to inform the public whether the conditions to which the offer was subject were fulfilled or whether the acquiror waives certain conditions. In such statement the offeror often waives conditions on the percentage of acceptance; if for example

[37] Art. 14 para. 2 TOB-Ordinance.

the offer was subject to the condition that it was accepted for 98% of the outstanding shares and the acquiror has received acceptances for only 90% of the shares the acquiror often waives the 98%-condition.

5.3 Grace Period

If the tender offer has been successful i.e. if the acquiror upon the publication of the results has stated that the conditions to which the offer was subject have been fulfilled or waived or in certain cases have become conditions subsequent – the acquiror has to grant all the other shareholders a grace period of 10 days to accept the offer.

5.4 Publication of Final Result

After the expiry of the grace period, the acquiror has to publish the final result of the tender offer. According to art. 46 TOB-Ordinance the publication has to contain the same information as the publication of the interim results after the expiry of the original acceptance period.

5.5 Squeeze-Out

If the acquiror after the expiry of the original acceptance period and the grace period owns more than 98% of the voting rights of the target company he may demand that the remaining shares be cancelled[38]. The threshold of 98% includes not only the shares held by the acquiror or its subsidiaries but also shares that are held by the target company and by any third parties who cooperate with the acquiror for the purposes of the tender offer. To cancel the remaining shares, the

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[38] Art. 33 SESTA.

offeror must, within 3 months after the expiry of the grace period, file such request with the competent court at the domicile of the target company and supply to the court evidence that the preconditions for such cancellations are fulfilled[39]. After the court has ordered the cancellation of the shares, the target company reissues the shares concerned to the acquiror who has to pay the tender offer price or transfer the securities offered in an exchange offer to the owners of the cancelled shares. The shareholders subject to cancellation may participate in the procedure. They have however no ability to challenge the price if the conditions for a cancellation are fulfilled, but must accept such price.

[39] The acquiror has in particular to prove that a tender offer has been launched and due to such tender offer, the acquiror and persons cooperating with the acquiror have obtained a total of 98% of the votes in the company.

6. COMPETING OFFERS

The TOB-Ordinance provisions on competing offers are intended to establish sufficient competition between the competing acquirors:

- *The target company has to treat all acquirors equally.*

- *If competing offers are made, the deadlines of all competing offers are extended to such extent that the shareholders of the target company have a choice between the competing offers.*

- *Shareholders who have accepted an offer may revoke such acceptance if a competing offer is launched.*

If a target company is attractive it is possible that several potential acquirors may launch tender offers. Such competing bids are relatively rare as the second acquiror has to offer a premium over the first offer which makes the acquisition often very expensive. Furthermore most tender offers for Swiss public companies are not decided by the acceptance of the public shareholders but before the launch of the tender offer by the acquiror's acquisition of major stakes in the company.

Art. 48 seqq. TOB-Ordinance regulate competing offers with the intent to establish open and fair competition between competing offers.

6.1 Equal Treatment of all Acquirors by the Target Company

As described in para. 4.3 above the target company must treat all competing acquirors equally and in particular has to give each acquiror the access to the same information.

6.2 Adjustment of Deadlines and Acceptance Periods

If a competing offer is launched the acceptance period of the competing offer must be at least as long as the acceptance period of the first offer and at least amount to 10 stock market days. Furthermore, according to art. 50 TOB-Ordinance the acceptance period for the first offer is automatically extended until the expiry of the acceptance period of the second offer if the acceptance period of the second offer expires later than the acceptance period for the first offer.

6.3 Withdrawal of Acceptances

A competing offer has been launched the shareholders of the target company may withdraw their acceptance of the first offer so that they may accept the second offer in spite of having previously accepted the first offer[40].

6.4 Optional Withdrawal of Offers

If a competing offer is launched, the first offer may be changed by the offeror as long as such changes are to the benefit of the target company's shareholders. In particular, the first acquiror therefore may increase the offer price in order to effectively compete against the second offer.

If a competing offer is launched the first acquiror may also withdraw its offer[41]. This provision allows an offeror whose offer has been clearly exceeded by another offeror to terminate the offering procedure without going through the further steps of the procedure.

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40 Art. 50 para. 2 TOB-Ordinance.
41 Art. 51 TOB-Ordinance.

7. MANDATORY TENDER OFFER

- *If a person directly or indirectly, alone or in cooperation with third parties, acquires shares which, together with those already owned by the acquiror, exceed the threshold of 33 $^{1}/_{3}$% of a listed company's voting right, the acquiror has to launch a tender offer to acquire all listed equity securities of such company.*
- *A company may in its articles of incorporation waive the obligation to make a mandatory tender offer for its shares ("Opting-Out") or may increase the threshold up to 49% ("Opting-Up").*
- *A mandatory tender offer is subject to the same rules as an ordinary tender offer. It may however only be subject to conditions imposed by law such as merger control authorizations or other governmental authorizations.*
- *The tender offer price must be to at least 75% of the highest price the acquiror has paid within the last 12 months before the offer is launched and may not be below the stock market price of the shares concerned.*

7.1 The Obligation to Launch a Tender Offer

If a person directly or indirectly[42], acting alone or in cooperation with third parties[43], acquires equity securities which, together with those already owned by such person, exceed the threshold of 33 1/3% of a company's voting rights, such person has to launch a tender offer for all listed shares of the company according to art. 32 SESTA[44]. If, in its articles of incorporation, the target company has defined a higher threshold for a mandatory tender offer ("Opting-Up")[45] the acquiror has an obligation to launch a tender offer only if its interest in the company exceeds such higher threshold. As described in para. 7.4 below a company can also exclude the application of the rules on mandatory tender offer

42 See Art. 26 and 27 of FBC-Ordinance for the definition of indirect purchases.
43 "Cooperation with third parties" refers to the pertaining provisions on the obligation to notify material participations; cf. para. B.1.4 below.
44 No tender offer has to be made for unlisted shares.
45 Cf. para. A.7.4 below.

in its articles of incorporation ("Opting-Out") so that an acquiror may purchase an interest of any size without being obliged to launch a tender offer.

7.2 Exemptions

According to art. 33 FBC-Ordinance an acquiror who exceeds the applicable threshold has no obligation to launch a tender offer in the following cases:

- **Work-out situations**

  If a company in a work-out situation first reduces its capital and then subsequently increases its capital again a shareholder who participates in the capital increase may exceed the applicable threshold if not all of the other shareholders participate in the capital increase. In order not to deter shareholders from participating in capital increases in connection with work-out situations art. 33 FBC-Ordinance exempts such shareholders from the obligation to launch a tender offer.

- **Subscription syndicate**

  A subscription syndicate of banks who subscribes to newly issued shares of a company does not have to launch a tender offer, even if its interest in the issuer temporarily exceeds the applicable threshold, as long as the syndicate is obligated to sell the shares within 3 months after their acquisition[46].

- **Inheritance, gift, collection procedure**

  According to art. 32 para. 3 SESTA a person who acquires the shares through a gift, by inheritance or in a collection procedure is not under an

[46] The Federal Banking Commission may, however, extend this 3 months deadline for valid reason; the Federal Banking Commission will in particular extend the deadline if the subscription syndicate is unable to sell the shares concerned due to adverse conditions of the capital market.

obligation to launch a tender offer, even if such person's interest in the company concerned exceeds the applicable threshold.

According to art. 32 para. 2 SESTA the Federal Banking Commission may in justified cases grant further exemptions from the obligation to launch a tender offer. Art. 34 para. 2 FBC-Ordinance and art. 32 para. 2 SESTA mention the following situations in which an exemption is granted:

- If a group of shareholders as a whole is subject to an obligation to launch a tender offer when it increases its total holdings, transfers between the members of such group may be exempt from the obligation to launch a tender offer[47] even if due to such transfer one single member of the group exceeds the applicable threshold[48].

- If the applicable threshold is exceeded only temporarily.

- If the threshold is exceeded as a result of the decrease in the total number of voting rights of the company; such situation may change if the company concerned reduces its capital.

- If the threshold is exceeded because a shareholder has received bonus shares or has exercised subscription rights in a capital increase. The participation in a capital increase may cause a shareholder to exceed the applicable threshold other shareholders do not participate and therefore the relative participation of the shareholders in the company's capital changes due to such transaction.

- The acquiror has purchased shares in a work-out situation.

[47] For the definition of groups subject to the obligation to launch a tender offer see para. B.1.4 below.

[48] This situation arises if a group has held a participation in excess of the threshold before SESTA entered into force or before the company concerned was listed.

- The participation of the acquiror, in spite of the fact that it exceeds the applicable threshold, is still smaller than the participation of other shareholders. This situation can develop if the company has a major shareholder who acquired his participation before the listing of the company or before the provisions on mandatory tender offers entered into force.

- If the acquiror has acquired the interest in the listed company concerned only indirectly through the purchase of its parent company and the acquisition of the interest in the listed company concerned has not been the main purpose of the transaction. The Banking Commission would, for example, grant an exemption if the purchaser has acquired an industrial company which owns also an interest in a Swiss listed company which exceeds the threshold, but it will not grant an exemption if the purchaser has acquired a holding company which only owns an interest in the listed company concerned.

7.3 The Offer

A mandatory offer is subject to the same rules on formal content as a voluntary tender offer. However the acquiror's ability to subject the offer to conditions is restricted; according to art. 32 FBC-Ordinance a mandatory offer may only subject its offer to the following conditions:

The offer may be subject to the condition that certain authorizations required by applicable law for the completion of a takeover be granted[49]. A mandatory offer can therefore be subject to the authorizations of Swiss or foreign Merger Control Authorities.

[49] Such conditions may refer to authorizations necessary under Swiss as well as under foreign law.

The offer may also be subject to the condition that the target company's board of directors does not alter the economic substance of the company during the acceptance period and that the acquiror obtains voting rights for the shares acquired in the tender offer. This means that the acquiror may subject its offer to the condition that the shareholders' meeting of the target company cancels any transfer or voting rights restrictions which prevent the acquiror from exercising voting rights of the shares he acquires in the tender offer.

7.4 The Tender Offer Price

The price offered in a mandatory tender offer may not be lower than the stock market price at the time the offer is launched and must be at least equal to 75% of the highest price the acquiror has paid within the last 12 months for shares of the target company[50]. This limits the control premium that may be paid for the acquisition of a major participation before the tender offer is launched to 33 $^{1}/_{3}$% of the price paid in the tender offer. The elements determining the minimum offer price are calculated as follows:

- **Stock market price.**
  The relevant stock market price is equal to the average of the opening prices the shares concerned have reached in the last 30 trading days prior to the publication of the offer[51]. According to art. 37 para. 3 FBC Ordinance, the average price calculated in this manner must be adjusted to take account of any capital transactions which are relevant for the valuation of the shares

[50] Art. 32 para. 4 SESTA.

[51] If the shares concerned are listed on a Swiss as well as on a foreign exchange only the opening prices attained in at the Swiss Exchange are taken into account.

concerned (splits, dilution through rights offerings, payback of capital and dividend payments).

- **Price paid in prior transactions**

  The highest price the acquiror has paid for the shares of the target company within the last 12 months prior to the publication of the offer is relevant. If the target company has several classes of shares and the acquiror has only purchased shares of one class, the prices for the other classes of shares have to be determined in accordance with the special rights attaching to the shares of each class. For such a purpose not only do differences in nominal value have to be taken into account but any priority rights (higher voting power or preferred rights on dividends and liquidation proceeds) also have to be valued. However, the price differentiation between the different classes of shares, in my view, may not have the effect that the premium paid for privately held shares with special voting rights exceeds $33\ {}^{1}/_{3}$ percent over publicly held ordinary shares in the end. Otherwise, the limitation on the premium paid for a controlling interest is circumvented; the maximum premium allowed under the Stock Market Act takes into account that a majority or a major part of the voting rights are already transferred and, therefore, a differentiation in voting rights may not lead to any bigger premium.

  If the acquiror has paid for shares by transferring securities such securities must be valued at the time the transfer took place. If in addition to cash payments and transfer of securities, further performance or covenants of the parties are involved such performances and covenants have to be valued to calculate the relevant purchase price. If, for example, the seller contributed certain assets to the company before the sale or agreed to warranties and representations or a non-compete covenant, the value of such performance and covenants must be subtracted from the purchase price actually paid. If on the other hand the seller has, in addition to the cash paid, provided services or transferred other assets to the seller, the relevant purchase price must be increased by the value of such additional performance. Any valuations of such non-cash items and covenants must be assessed by the special auditors appointed for the takeover and such audit report has to be submitted to the Takeover Board no later than one week before the publication of the offer[52].

7.5 Opting-out and Opting-up

The price rules described in para. 7.4 above have the effect of limiting the premium that that the acquiror may pay to the main shareholder for a controlling interest in a company; in that sense, the controlling shareholder must share the control premium at least partly with the other shareholders.

In order to avoid such consequences a company may, according to art. 22 para. 2 SESTA, exempt its shares from the rules on mandatory tender offers by inserting a provision in its articles which states that the rules of the Stock Exchange Act on mandatory tender offers do not apply to the shares of the company. With such an “opting-out” it is possible for a main shareholder to sell control in the company without involving the public shareholders and obtain the full control premium in such transaction. A company may introduce a provision to this effect in its article of incorporation before it is listed. A company may also introduce such a provision to its articles of incorporation after it has been listed. However, according to art. 22 para. 3 SESTA such a change in the articles of incorporation may not violate the principle stated in art. 706 CO that all shareholders must be treated equally. Therefore, a decision of the shareholders’ meeting to introduce

52 Art. 38 para. 4 FBC Ordinance.

an opting-out clause may be challenged by minority shareholders if there are no other reasons for such a change in the articles than to further the interests of a main shareholder who wants to sell his controlling stake in the company.

A company may, according to art. 32 para. 1 SESTA, also increase the threshold for mandatory offers up to 49 % by inserting a clause to such effect in its articles of incorporation (“opting-up”). With such opting-up clause, it is still possible to sell major stakes in the company without triggering a tender offer but an acquiror may not purchase a majority of the shares without making a tender offer to all the shareholders.

8. DEFENSE MEASURES AGAINST UNFRIENDLY TENDER OFFERS

- *Under Swiss law, a listed company may include provisions in its articles of incorporation which serve as a defense against takeover attempts. In particular, a company may limit the voting rights a shareholder may exercise in the shareholders' meetings, restrict the transfer of shares, create shares with privileged voting rights and require super majorities for any dismissal of directors and any changes of the anti-takeover provisions.*

- *For the board of directors it is also very helpful if the shareholders' meeting passes a general resolution confirming that the company intends to remain independent, as this makes it easier for the board to actually enforce the defense provisions contained in the articles of incorporation.*

- *A sale of attractive assets to a "friendly party", the issuance of shares below market price to a white knight and the grant of excessive severance packages ("golden parachutes") is problematic as any loss the company suffers due to such defense measures can lead to the directors' liability.*

8.1 The Target's Board of Directors in a Takeover Attempt

Swiss corporate law allows the board of directors of a target company to defend the target company against takeover attempts of third parties. As long as the board does not use any illegal means, the board does not become liable toward the target company's shareholders even if its defense tactics prevent the shareholders from taking advantage of certain financially attractive takeover offers. According to art. 717 CO, a company's board must safeguard the interest of the company. Therefore, the board's first priority must be to ensure that the company continues to exist as a viable enterprise. On the other hand, the board has no direct obligation to ensure that the shareholders realize a short-term capital gain on the basis of a takeover offer. If, in the reasonable judgment of the board of directors, it is in the long-term interest of the target company to defend itself against a takeover offer, the board would not incur any liability towards the shareholders or any acquiror if the board uses the means provided by the company's articles of incorporation and by Swiss law to defend the target company against such takeover. The fact that in an economic sense the shareholders suffer damage due to the fact that they cannot accept a tender offer is not sufficient ground for a claim against the directors. The directors may, however, become liable to the company if they use defense tactics which damage the target company itself. For example, selling certain valuable assets below fair market value to make the company less attractive for an acquiror would not be a permissible defense tactic. In a case where the defense action results in a direct decrease in the Target's equity, the board risks being sued according to art. 754 CO by the company or by shareholders demanding that the board restitute the damage caused to the target company.

8.2 Defense Mechanism in the Target Company’s Articles of Incorporation

Swiss corporate law allows companies to include in their articles of incorporation certain provisions which enable the board to defend itself against a takeover attempt.

8.2.1 Limitation of Voting Rights

Although every share in principle confers one vote to its owner, the articles of incorporation may limit the number of shares each shareholder may represent at a shareholders' meeting. A considerable number of listed Swiss companies have limited the votes one shareholder may represent at a shareholders' meeting to a certain percentage of the total shares outstanding or the total number of shares represented at such meeting. Such a limitation on voting rights is, in particular, efficient if it is coupled with a "group clause" which extends the limitation on voting rights to groups of shareholders which by contract or otherwise are coordinating their voting in a shareholders' meeting and declares such groups to be one shareholder for the purpose of applying the limitation of voting rights.

The articles of incorporation of most companies which limit the number of voting rights provide that the board of directors may grant exceptions from such limitations. Such exceptions are usually granted to banks which as depositories exercise the voting rights of their customers since often only such exceptions make it possible to hold a shareholders' meeting with a reasonable presence of shareholders. The board of directors does not create any problems by granting such exceptions to banks, as depositories do not exercise the voting rights in their own interest but on behalf and in the interest for their customers. It is, however, very problematic if the board of directors grants exceptions to "friendly shareholders" in order to obtain a stronger support in the shareholders' meeting. According to CO art. 717 para. 2 the board has the obligation to treat all shareholders equally. Such exceptions to friendly shareholders may, therefore, provide an acquiror with an enforceable claim against the company for an exception on the basis of the principle of equal treatment; the fact that a shareholder votes in favor of the board's proposals does not justify a different treatment for the friendly shareholder with regard to voting rights but forces the board to grant exceptions to all shareholders with similar shareholdings.

8.2.2 Transfer Limitations

According to art. 685 ff. CO, the articles of incorporation of a company may provide that the ownership in registered shares can only be transferred if the board of directors consents to such transfer. If the company's shares are listed, the board of directors may, however, disallow a transfer only if the number of shares the shareholder holds exceeds a limit defined in the articles of incorporation.

Various listed companies have adopted such provisions in their articles of incorporation generally setting the limits between three and five percent of total share capital. If a person purchases a number of shares on the stock exchange which exceeds such limit such person will be registered for the number of shares in excess of the limit as a shareholder without voting rights. The shareholder concerned has in such case all the financial rights of a shareholder (in particular, rights to the payment of dividends and liquidation proceeds and to subscription rights) but has no voting rights for the shares concerned.

The articles of incorporation often provide that the board of directors may grant exceptions from the limit defined in the articles of incorporation. The grant of such exceptions, however, entails considerable risk as the board is obliged to treat all shareholders equally according to art. 717 para. 2 CO. An acquiror may, therefore, derive from such principle a right to also be registered for a number of shares in excess of the limit set in the articles of incorporation as shareholder with voting rights if the board of directors has granted other shareholders such an exception. Such claim may, however, not be raised if a shareholder is registered in excess of the limit set in the articles of incorporation because he was registered as a shareholder with voting rights before the limits concerned were introduced. The subsequent introduction of such limit does not allow the company to delete the voting rights of shareholders who have been registered as voting shareholders before the introduction of the limit; the existence of shareholders with “grandfathered” voting right, therefore, does not violate the principle of equal treatment.

If a takeover defense is based on transfer restrictions, the articles of incorporation must provide that the change of registered shares into bearer shares is only possible if the shareholders' meeting takes such decision with a qualified majority. Otherwise, the transfer restrictions can be easily circumvented by a shareholders' meeting resolving to transform registered shares into bearer shares.

8.2.3 Qualified Majority for the Dismissal of Board Members

The articles of incorporation can provide that the members of the board of directors may be voted out of office only by a qualified majority of the shareholders' meeting. Such provision will prevent the whole board of directors from being replaced in a shareholders' meeting with a new board which is friendly to the acquiror, and which ceases to enforce voting limitations and transfer limitations by granting exceptions to the acquiror. The company's protection can be further improved by staggering the tenure periods of the board members in such a way that each year only one third or one quarter of the board members are re-elected at a shareholders' meeting. Such staggered tenure periods prevent an acquiror from replacing the entire board of directors with new directors who are friendly to it at a shareholders' meeting at which all the board members are re-elected.

Provisions on staggered tenure periods and on qualified majorities for the dismissal of directors, however, can protect a company only if the articles of incorporation also limit the number of board members. Otherwise, the acquiror could simply propose the election of such number of new board members as it would need to obtain a majority on the board, even if the present board members continue to serve in their function.

8.2.4 Shares with Voting Privileges and Non-voting Shares

According to CO art. 693, a company may create several classes of shares which have different nominal values but identical voting rights. The shares which have privileged voting rights in relation to their nominal value ("*Stimmrechtsaktien*") must, however, be issued in the form of registered shares and must at least have one tenth of the nominal value of the ordinary shares. If a group exercising control over a company owns shares with privileged voting rights it may control the majority of the company's votes with only a relatively small share of the company's capital. However these voting privileges do not extend to all resolutions of the shareholders' meeting. For certain important resolutions listed in CO art. 704, not only is the consent of two thirds of all the votes present in a shareholders' meeting necessary, but the majority of the capital represented at such shareholders' meeting is also required. This means that the shares with a higher nominal value in spite of the voting privileges of the "Stimmrechtsaktien" may block the pertinent resolution. Furthermore, the company's auditors are elected not on the basis of voting rights but on the basis of nominal value of the shares so that the privileged voting rights do not play a role in the election of auditors. The same rule also applies with regard to the shareholders' meeting decision to conduct a special audit ("*Sonderprüfung*") or to sue the directors.

The leverage of privileged voting rights can be further increased by issuing non-voting shares ("*Partizipationsscheine*"). However, according to CO art. 656a, the total nominal value of the non-voting shares may not exceed the total nominal value of the voting shares. Through the issuance of non-voting shares and the issuance of shares with voting privileges, it is theoretically possible to control a company with a relatively small percentage ownership of the company’s capital. If the limits for voting privileges and non-voting shares are exploited to the full extent, it is, in principle, possible to hold 50% of the votes with only 2,5% of the company's capital. Although to my knowledge no listed company has a capital structure which makes use of these possibilities to the full extent, several listed companies have structured their capital with the aid of voting privileges and non voting shares in such a manner that the company can be controlled by shareholders who own only a relatively small portion of the company's capital.

In such structures it is also possible to list only the non-voting shares or the shares without voting privileges so that the shares with voting privileges are closely held, rather than traded along with the rest of the shares. This allows a company to have more stringent transfer restrictions for shares with voting privileges than for the listed ordinary shares[53]. This makes it possible for a group, that is interested in the control of the company (family or management) to keep the privileged voting shares concentrated in their hands.

A disadvantage of a capital structure which grants control to a group of persons who hold only a minor participation in the company's capital is that the ordinary shares in the stock market will normally trade at a lower valuation than the shares of a company with a "one share / one vote" structure. Therefore, in the last few years, several companies changed their privileged voting structures into “one share/one vote” and converted any non-voting shares into voting shares to improve their market capitalization in order to gain better access to new capital.

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53 According to CO art. 685b it is, in particular, possible to provide with regard to non-listed shares that the board of directors may block any transfer as long as the company, the board or a third party appointed by the board is willing to pay the "true" value of such shares.

8.2.5 Protection of Defense Provisions

Defense provisions in the articles of incorporation must be protected by rules which require qualified majorities in the shareholders' meeting for the deletion of such provisions. Normally, articles of incorporation require two thirds or three quarters of the votes represented at the shareholders' meeting for the deletion of the specific defense provisions. Furthermore, a qualified majority which is not based on the shares represented at a meeting but on the total number of shares outstanding has proved to be very efficient in protecting defense provisions. For example the requirement that one third of the outstanding shares consent to the deletion of specific defense provision is a very high hurdle, as in most shareholders’ meetings of public companies, less than 50 % of the shares are represented. A buyer who has purchased a big block of shares and thereby has exceeded voting limitations or registration limitations, in fact, creates a situation which makes it even more difficult to assemble the required majority since the shares owned by the buyer in excess of such limits carry no voting rights and thus reduce the total number of shares available at the shareholders' meeting.

8.3 Defense Measures Outside the Articles of Incorporation

Apart from defense measures based on the articles of incorporation, listed companies have developed a number of other strategies to defend themselves from unfriendly takeovers:

8.3.1 Shareholder's Resolution on Independence

In the early 1990s, shareholders' meeting of several listed companies passed resolutions confirming that the company should remain independent. Such resolutions do not prevent parties interested in a takeover from purchasing shares in the company. However, when the board of directors has to take decisions on the enforcement of defense provisions contained in the articles of incorporation, such a resolution can give the board guidance in favor of enforcing such provisions. For example, if a board must decide on the request of an acquiror to be granted an exemption from the transfer and voting restrictions, an existing resolution regarding the Target’s independence would facilitate the denial of such a request.

8.3.2 Secure Shareholders and Shareholder Agreements

If shares are owned by shareholders who have more than a mere financial interest in the company concerned, such as, in particular, employees, suppliers or the company’s pension fund, it is often possible to defer takeover attempts as these shareholders are not inclined to sell their shares even for relatively generous offers. The creation of share ownership programs for employees and management (in particular leveraged ownership plans) is a good method to increase the number of shares held by such “secure” shareholders.

If a group of shareholders who are particularly interested in the company exists, they also often enter into shareholder agreements in which they grant a reciprocal right of first refusal. Such "shareholder pools" exist in several Swiss listed companies and prevent those shareholders from selling their shares to a third party acquiror as long as at least one of the other shareholders in such pool exercises its right of first refusal.

8.3.3 Golden Parachutes

Many companies provide their top management with a relatively generous exit package if the employment agreement is terminated after an unfriendly tender offer. The grant of such "golden parachutes" is possible if such arrangements are in the best interest of the company concerned. In the case of a company exposed to takeover threats, such interest will normally exist as the company cannot recruit new top management if these persons are not offered some protection in case of a dismissal which is normally the consequence of a takeover. In a golden parachute package, top managers are usually granted compensation in the amount of several years' salary and a release from any restrictions on the shares and options granted under the company's share ownership or option plans. The golden parachutes become effective when control over the company changes and the employment agreement between the company and the manager concerned is terminated for whatever reason within a specified period after the change of control.

In most cases the aggregate volume of gold parachute packages is, however, irrelevant for the tender offer since even generous solutions usually do not have any material influence on the company's enterprise value. Golden parachutes are, however, problematic if they exceed the normal protection which is necessary for the recruiting of top management. Such overly generous plans must be regarded as spoilage of company means, which would enable the company and its shareholders to sue the directors who have granted such packages for damages. It is difficult on a general level to distinguish between the normal protection necessary for the recruitment and retention of top management and the spoilage of the company's means as this depends to a large extent on the specific circumstances of the company concerned. In order to take a decision in this regard, it is therefore necessary to analyze on one hand, the market practice in the industry concerned, but also the other hand, the effect the payment has on the company's equity and its value[54].

Protection measures for the benefit of top management should, however, always be put in place before a tender offer is launched as the possibility of instituting such compensation packages is limited once the tender offer has been launched. According to art. 35 TBO-Ordinance, the grant of unusually highly severance packages after the launch of a tender offer is prohibited. Although the term "unusually high" does not give guidance as to the exact amount permissible, it appears that during the time a tender offeror is open, no severance packages may be granted which exceed the salary paid during usual termination period plus an amount that depends on the length of service in accordance with applicable industry standards[55]. Even after the launch of a tender offer the board of directors may, however, grant generous exit packages to those managers and directors who directly negotiate with the acquiror as such measure is necessary to avoid a conflict of interest situation for these persons; only an exit package which fully protects them from the economic effects of a termination will stop them from immediately aligning themselves with the interest of their prospective employer - the acquiror – thereby enabling them to actually defend the interest of the company and its shareholders and, in particular, to obtain a high price for the shareholders.

8.3.4 Sale of Attractive Assets

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[54] In order to judge whether packages are appropriate and to avoid any later claims that the board of directors did not act prudently it is advisable that the board obtains an opinion of an outside human resources consultant on the normal size of exit packages in the industry concerned before granting exit packages.

[55] In such case, it is extremely important that the board members actually obtain an outside opinion on the industry standard of exit packages.

A radical strategy for avoiding tender offers is to sell attractive assets or to grant a third party the right to purchase such assets in the event of a change of control. Such radical strategies are highly problematic for the board of directors; shareholders may claim that the board failed to pursue the company's best interests with such transaction when it willingly reduced the company’s value by selling valuable assets for too low a price. Such a spoilage of the company’s assets is considered a violation of art. 717 CO. Consequently the board of directors can become liable to the shareholders for the damages caused i.e. the difference between fair market value and the price actually received for the assets concerned. In view of such risk the sale of attractive assets or the grant of purchase options for a change of control situation cannot be recommended.

Sometimes it is, however, possible to grant a purchase option for an important asset if (i) such grant of option is part of a bigger transaction, (ii) the whole transaction (*e.g.*, the formation of a joint venture company) is in the best interest of the company and (iii) the grant of such option is a condition for the other party to enter into such agreement. Indeed, in case a joint venture is formed, many counterparties will demand that a purchase option is granted over the other parties’ share in the joint venture company if there is a change of control.

In any event, according to art. 29 Abs. 2 of the Stock Exchange Act and art. 35 of the TOB-Ordinance, the company may not sell assets with a value or price exceeding ten percent of the consolidated assets of the company concerned after a tender offer has been launched[56].

8.4 Lock-up Clauses Against Competing Offers

56 cf. para. A.4.2 above.

If the board of directors accepts the proposal of a tender offeror and recommends the offer for acceptance by the shareholders, the parties often try to prevent third parties from filing a competing offer. In Switzerland the following tactics have been used to thwart competing offers.

8.4.1 Liquidated Damages

Sometimes the target company and the acquiror in a transaction agreement agree on a payment by the target company to the offeror if a competing tender offer of a third party is accepted by the shareholders. It is questionable whether such agreements are valid as it can be argued that the company tries to unduly influence a decision which only the shareholders can take by promising to pay a certain amount if its shareholders do not accept the offer of the acquiror concerned; the shareholders only have the choice of accepting the offer or reducing the company's equity. Unfortunately there are no court decisions on this question[57]. In my view the promise to make payments which exceed the cost actually incurred by the first acquiror offered in preparing the tender offer is not valid as such excess payment constitutes a penalty to the shareholders through the reduction of the company's equity. On the other hand the reimbursement for the actual cost in my view seems to be defensible as the target company's board of directors can maintain that only with the promise of such reimbursement would the acquiror be willing to launch a tender offer and that this was in the best interest of the shareholders because the tender offer gives them the opportunity to realize a gain.

[57] In a recent case (Feldschlösschen Hürlimann Holding) the tender offer of a third party was rejected due to the efforts of certain shareholders which then took over the board of the company. Such new board decided not to pay the amount agreed to the tender offeror as it regarded the promise to be non-binding due to the fact that the company tried to unduly influence a decision which only the shareholders could take. The case has now, however, been settled.

8.4.2 Crown Jewel Options

In a crown jewel option agreement the target grants the acquiror the option of purchasing certain attractive assets at a favorable price if a competing tender offer of a third party is successful. Such an agreement violates art. 29 para. 2 SESTA and art. 35 TOB-Ordinance if it is entered into after a tender offer has been launched, i.e., the board grants such option to an acquiror who makes a friendly tender offer in competition with a first unfriendly tender offer. The consequence of such violation is that the agreement would be null and void. In view of these provisions, a crown jewel option agreement may be concluded only with the first acquiror as the agreement in such case would be executed before a tender offer is launched and therefore would not be covered by art. 29 para. 2 SESTA and art. 35 TOB-Ordinance. Even when an agreement on a crown jewel option does not violate these provisions, it may be problematic for the board of directors who grants such an option. The shareholders or the company may sue the directors on the fact that by entering into such agreement the board of directors - contrary to its obligations under art. 717 CO - has not pursued the interest of the company but rather, has damaged the company by selling an asset at too low a price.

9. TRANSACTION AGREEMENTS FOR “FRIENDLY” TAKEOVERS

- *If the board of directors of the target company agrees to a tender offer, the details of such tender offer and the action to be taken by the target company and its board with regard to such offer are often described in a transaction agreement. Such transaction agreements often also contain statements of the acquiror on the integration, further development and management of the target company.*

- *Such transaction agreements are not enforceable in the sense that the acquiror can assure the success of the tender offer as only the shareholders of the target company determine the success of the tender offer by accepting or rejecting it. Any statements on the future of the target company are also not enforceable since the target company, after a successful tender offer, ceases to be an independent contracting party as it is under the complete control of the acquiror.*

- *The contents of a transaction agreement must be disclosed in the tender offer prospectus.*

Transaction agreements are concluded if the boards of directors of two companies have come to the conclusion that a merger of the two companies would be favorable for the companies and their shareholders and that such transaction can best be completed if one company launches a tender offer for the other. Often transfer agreements which lead to a “friendly” tender offer, however, are also the result of the target company’s board of directors’ resignation. This is the case if the acquiror by purchasing a high percentage of the target company’s shares in the open market or otherwise has exercised such pressure that the target company’s board of directors has to deviate from its original intent to keep the company independent.

9.1 Content of a Transaction Agreement

Normally a transaction agreement covers the following points:

9.1.1 Description of transaction with a time table

In a transaction agreement the individual steps of a transaction and the major points of the tender offer will be defined (in particular the price and the conditions to which the tender offer is subject). It is also recommendable to define a clear time table for the steps each party has to take and to determine which party is responsible for such steps and the necessary documentation. For the acquiror it is essential that in such an agreement the target company's board of directors agrees to issue a report recommending the acceptance of the tender offer, which can be integrated into the tender offer prospectus.

9.1.2 Due Diligence

If the acquiror conducts a due diligence before the launch of the tender offer the extent of such due diligence and the secrecy obligations of the acquiror are part of the transaction agreement. Often the parties will not make a detailed in-depth due diligence as the target company according to art. 48 TOB-Ordinance has to treat the competing bidders equally and therefore would have to give the same due diligence documents to a competing acquiror. Due to this obligation to treat competing bidders equally, pre-tender offer due diligence exercises are usually limited to a "high level due diligence" which is limited to information on business issues and risks which have a material influence on the offer price or the decision to make an offer and excludes vital business secrets. An extended due diligence (as is usually conducted in privately negotiated acquisitions) can be conducted if prior to the public tender offer the acquiror intends to purchase in a privately negotiated deal a majority stake in the company from the target company's major shareholders; in such cases the due diligence is normally conducted prior to the acquisition of the controlling stake in the company.

9.1.3 Organizational Integration of the Target Company, Organization and Management after the Tender Offer

Often a transaction agreement will also contain provisions on the integration of the target company into the acquiror's business, the further development of the target company and its organizational structure. In most cases the target company's board of directors will insist on such provisions in order to ensure an optimal solution for the target company and its employees. However, such provisions can be ignored by the acquiror after a successful tender offer as the target company will be controlled by the acquiror who can renounce such provisions. Furthermore, the acquiror, through its control of the target company, may decide not to enforce the target company's rights under the transaction agreement.

9.1.4 Further Employment of Management and Directors

Often transaction agreements contain provisions on the election of the target company's directors to the board of directors of the acquiror in order to demonstrate the cooperation between acquiror and target company as well as the continuity of management. Such provisions are not enforceable since the acquiror's shareholders' meeting is the only body which can determine who shall be on the board. Therefore, in a transaction agreement, the acquiror can only promise to propose certain of the target company's directors for election in its board but cannot ensure their election. To the extent transaction agreements contain statements on the future management structure, combined business goals and further employment of employees of the target company, these are normally only worded as a declarations of intent in order to prevent the managers and employees concerned from deriving employment rights or specific positions from the transaction agreements.

To the extent the target company has concluded exit agreements with its top management (golden parachutes) the acquiror usually acknowledges their existence in the transaction agreement and declares that it will accept such agreements as enforceable.

9.1.5 Counter Offers / Competing Offers

Normally, a transaction agreement will provide that the parties, in case of competing offers, will consult each other on possible countermeasures. However, the target company's board of directors may not agree to dismiss all competing offers and to use all measures provided in the articles of incorporation against such offers as it may - according to its obligation to safeguard the company's interest - be forced to recommend the that shareholders accept a competing offer if such offer is clearly better for the target company and its shareholders. As the target company's board of directors[58] is obliged to treat competing offers equally and to give a second acquiror or the same information to the first acquiror, the target company may not make any promises in a transaction agreement which would violate the principle of equal treatment of all acquiror.

In view of the risks which lockup provisions entail[59], the target company's board of directors should not agree to any lockup provisions in a transaction agreement, such as, for example, the payment of liquidated damages in case the shareholders do not accept the tender offer or the grant of a call option on valuable assets at favorable prices.

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58 Art. 48 TOB-Ordinance.
59 Cf. Para. A.8.2 above.

9.1.6 Confidentiality

In a transaction agreement the parties usually agree to keep the intended transaction confidential until the publication of the tender offer prospectus. Naturally, the parties reserve the right to make disclosures to the extent they are legally required to do so.

In order to ensure confidentiality it is essential to limit the number of employees and consultants who work on the project and to have them sign specific confidentiality agreements.

9.1.7 Communication

In order to ensure the success of a tender offer the communication strategy of target company and acquiror has to be closely coordinated. Therefore, it is advisable to define a clear communication plan in the transaction agreement. As changes which influence the need for communication are often fast and surprising, such as in particular rumors or information leaks, the parties are well advised to form a steering committee which can react quickly and which ensures that both parties coordinate their reactions in such a case.

9.2 Binding Effect and Enforceability of Transaction Agreements

A transaction agreement is normally signed by senior management or by the chairman of the board of a company and is usually subject to the condition that the boards of directors of both the target company and the acquiror consent to the agreement. Although after such consent the transaction agreement is formally binding, such agreement has only a limited effect since the success of the tender offer depends entirely on the decisions of the target company's individual shareholders on whether to accept or reject the tender offer. Therefore, a transaction agreement to some extent only has the character of a declaration of intent; the target company and the tender offeror may incur valid obligations as to the execution of certain steps in preparing the takeover transaction, the acquisition of the target company's shares in the tender offer, however, cannot be agreed upon in a binding manner between target company and tender offeror.

As described in para. 9.1.3 above, the enforceability of the agreement is very limited with regard to any promises the acquiror has made on the organization and development of the target company after the successful tender offer. After a successful tender offer, the acquiror will control the target company and, therefore, can cause the target company to renounce to such obligations of the acquiror or simply not to enforce the acquiror's obligations.

B. OBLIGATION TO NOTIFY THE ACQUISITION AND SALE OF MATERIAL PARTICIPATIONS

According to art. 20 SESTA investors whose participation in a company (through acquisitions, purchase of additional shares or sale of shares) exceeds or falls below certain thresholds have to disclose such fact to the public and to the company. The purpose of such obligation is to inform the company and the other shareholders on the changes in the control in the company and to enable them to adapt their behavior to the new circumstances.

~~10.~~1. OBLIGATION TO NOTIFY

- *If a shareholder who individually acquires shares in a Swiss company listed in Switzerland (i) attains or exceeds 5%, 10%, 20%, 33 1/3%, 50% or 66 2/3% of the voting rights or (ii) sells shares and thereby falls below one of these threshold percentages, it has to notify the company and the stock exchanges on which the shares concerned are listed of such fact. If a shareholder's participation exceeds or falls below such threshold, because the total number of voting rights has changed, notice of such fact must also be given.*

- *The duty to notify also applies to the indirect acquisition of shares through trustees or companies controlled by the shareholder concerned and to any other transaction which allows a shareholder to exercise voting rights in its own interest.*

- *If certain shareholders coordinate their behavior regarding the acquisition and sale of shares or the exercise of voting rights (as for example with a shareholders' agreement or in a group of companies) the whole group is subject to the obligation to give notice on the basis of its total interest; transactions amongst the group, however, do not trigger any obligation to notify.*

- *The acquisition of call options and conversion rights as well as the writing of put options triggers the obligation to notify the public and the company provided that any option transactions up to 5% of total voting rights are exempt from such obligation. If options are exercised and the total participation therefore exceeds or falls below one of the threshold percentages, notice of such fact has to be given even if notice of the acquisition of the options has already been given.*

- *The disclosure office of the stock exchange concerned may exempt a shareholder from the obligation to notify if a threshold percentage is exceeded only for a short period of time or the transaction with which the shares concerned are sold or bought is subject to a condition, the fulfillment of which is unclear.*

~~10.1~~1.1 The relevant threshold percentages

According to art. 20 SESTA a shareholder who directly, indirectly or in cooperation with third parties purchases shares in a Swiss company that are listed in Switzerland and thereby reaches or surpasses 5%, 10%, 20%, 1/3, 50% or 66 2/3% of the voting rights has to notify such fact to the company and to the stock exchange on which the shares are listed. Such notification must also be made if a shareholder sells shares and due to such transaction falls below one of these thresholds. The calculation of the thresholds is based on the total number of shares with voting rights. For the number of voting rights as well as for the number of shares acquired by a shareholder, it is irrelevant whether the voting rights of such shares may actually be exercised or not. Therefore, shares which are owned by the company itself are also counted in the total number of votes although the voting rights of such shares are suspended in accordance with art. 659 a CO. On the other hand, shares owned by the shareholder concerned which carry no voting rights due to the application of transfer restrictions[60] do count towards the shareholders' total participation.

The obligation to notify is not only triggered when a transaction of the shareholder itself leads to the fact that the shareholder exceeds or falls below one of these thresholds. The notification obligation is also triggered if the total number of voting shares changes and therefore the percentage participation of the shareholder concerned increases or decreases in such manner that the participation exceeds or falls below one of the percentage thresholds. In this manner, an increase or decrease of the share capital can lead to a shareholder's obligation to notify the company and the stock market concerned. For example, the notification obligation is triggered if a company cancels treasury shares in a capital decrease and the percentage participation of a shareholder due to the lower number of total voting rights outstanding exceeds one of the above thresholds. On the other hand, a capital increase may have the effect that the percentage participation of a shareholder who does not proportionally participate in the capital increase falls below one of the thresholds due to the fact that the total number of voting shares increases. Therefore, a shareholder who wants to ensure the compliance with the notification obligation has to monitor not only his own transactions but also any changes in the company's capital structure which leads to a change in the total number of voting rights.

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[60] cf. para A.8.2.2 below

Furthermore, the transformation of non-voting shares into voting shares or the creation or elimination of voting rights privileges of certain shares may trigger the notification obligation when such transactions lead to a change of the total voting rights.

~~10.2~~1.2 The obligation to notify

The notification obligation falls on the ultimate beneficial owner for whom shares are held, bought or sold even if third parties have acted on the ultimate beneficial owner's behalf as buyers or sellers. Persons who only hold shares as depositories or trustees for the benefit or third parties therefore have no notification obligation. A bank which purchases and holds shares for several clients therefore has no notification obligation even if the total number of shares it holds has exceeded one of the applicable threshold percentages; only the clients for whom the bank holds such shares are subject to the notification obligation if they individually exceed a relevant threshold. This also applies also to the depository banks of mutual funds even if the fund companies are associated with the bank as the funds are considered as individual shareholders.

The company itself is subject to the notification obligation if it purchases or sells its own shares and its participation therefore exceeds or falls below one of the above percentage thresholds.

According to the principle that the exercise of the voting rights is decisive, the pledge of shares as well as security lending and repo-transactions do not trigger any notification obligation if the voting rights are not transferred in such transaction. If, on the other hand, the parties to a security agreement agree that with the grant of the security interest the voting rights pass to the recipient the grant of a security interest in shares can trigger a notification obligation if the relevant threshold percentages are exceeded.

~~10.3~~1.3 Direct and Indirect Acquisition of Shares

According to the principle that the ultimate beneficial owner is subject to the notification obligation such obligation exists not only for direct acquisitions of shares but also for the indirect acquisition whereby the ultimate beneficial owner does not formally become a shareholder but obtains economic control of the shares concerned. According to art. 9 FBC-Ordinance the following transactions are considered to be indirect acquisition of shares:

- The acquisition of shares by a trustee who acts on the account of the ultimate beneficial owner.

- The acquisition through a directly or indirectly controlled company; a company is deemed to be controlled if the ultimate beneficial owner by majority of the votes or other means can determine the actions such company takes.

- The acquisition of a controlling participation in a company which owns the shares concerned.

In principle, any transactions in which a person obtains the right to exercise voting rights in certain shares, in such person's own interest is considered as indirect acquisition of shares. On the other hand an agreement in which a person agrees to exercise the voting rights of certain shares in the interest of the owner of the shares is not considered to be an acquisition of the shares by such person. The grant of a power of attorney which empowers a person to exercise voting rights pursuant to the instructions or in the interest of the principal is therefore not considered to be an acquisition of shares for the purpose of art. 20 SESTA. Therefore, the exercise of voting rights by a depository or the acceptance of the mandate to act as a neutral shareholders representative and to exercise in such function in the shareholders' meeting votes also does not trigger any notification obligation.

~~10.4~~1.4 Groups of persons

According to art. 20 para. 1 SESTA a group of individuals who have organized themselves for the purpose of collectively acquiring or holding shares in a company is regarded as one entity for the purpose of notification obligation. Pursuant to art. 15 para. 1 FBC-Ordinance a group of persons is considered to be an organized group for the purpose of art. 20 para. 1 SESTA if persons coordinate their conduct by contract or by any other organizational means in order to acquire or sell shares or to coordinate their collective exercise of voting rights. Therefore, in particular, the following groups are collectively regarded to be entities for the purposes of the notification obligation:

- Companies controlled by the same parent company or individual ("group of companies").

- Shareholders who have concluded shareholders' agreements with regard to the acquisition of shares or the exercise of voting rights.

If a certain number of persons pursuant to art. 20 para. 1 SESTA is considered as a group for notification purposes the total number of shares held by such group is relevant to the application of the threshold percentages. On the other hand, the transfer of shares between persons belonging to the same group is not subject to the notification obligation even if an individual member of the group by such transaction exceeds or falls below one of the percentage thresholds. Changes in the composition of a group may trigger the notification obligation if the entry of a new member or the exit of a member results in the total participation of the group exceeding or falling below one of the thresholds. If, for example, an additional shareholder joins a shareholders' agreement and the number of shares held by all the shareholders participating in such shareholders' agreement increases to such extent that the threshold is exceeded, the group must notify the company and the stock exchange concerned.

~~10.5~~1.5 Option Transactions

According to art. 13 para. 1 FBC-Ordinance the sale and acquisition of conversion rights or call options and the writing of put options is subject to the notification obligation in the same manner as if the relevant shares had been purchased or sold. This applies, however, only if the options concerned provide the option holder with the right to sell or purchase the shares concerned. If options provide only for a cash less exercise and therefore only lead to the payment of the difference between market value and strike price, the acquisition and sale of such options are not subject to the notification obligation. If options or conversion rights are exercised, the exercise itself (in case such transaction results in an interest level which exceeds or falls below a percentage threshold) according to art. 13 para. 2 FBC-Ordinance will obligate the shareholder to notify the company and the stock market concerned. Therefore, an option transaction may trigger the notification obligation twice – first when options are purchased and the total participation (options and shares) of the shareholder exceeds a percentage threshold and a second time if the later exercise of the options leads to a total participation in shares which again exceeds the threshold concerned.

In order to simplify the writing and acquisition of options for persons who have a share participation that is near to one of the percentage thresholds, art. 13 para. 3 FBC-Ordinance exempts the purchase, the sale and the writing of options on less than 5% of total voting rights from the notification obligation irrespective of the number of shares the shareholder concerned holds. Therefore, a person who holds 4,9% of the shares of a company and purchases call option for a further 4,9% does not have to notify the company or the stock exchange. Such notification must, however, be made if the shareholder concerned exercises part of the option and thereby increases its shareholder above 5%.

The writing of call options and conversion rights as well as the purchase and sale of put options[61] are not subject to the notification obligation as such transactions do not directly lead to a loss of control by the shareholder concerned.

~~10.6~~1.6 Exemptions from the Notification Obligation

According to art. 20 FBC-Ordinance the disclosure offices of the stock exchanges may grant exemptions from the notification obligation if the threshold percentages concerned are exceeded only for a limited time and if the acquiror does not intend to exercise the voting rights of the shares concerned. On such basis an exemption may be granted to a subscription syndicate which purchases shares from a company or existing shareholders for the purpose of selling them to the public or if a subscription consortium in a capital increase underwrites the new shares and holds such shares until the shareholders of the company have exercised their preferential rights to such shares. An exemption may also be granted if a contract on the acquisition of shares is subject to

[61] Contrary to the writing of put options on existing shares which is subject to the notification obligation.

conditions the fulfillment of which is uncertain. In such case the notification office of the stock exchange concerned may allow the acquiror of the shares to make a notification only if the condition concerned has been fulfilled and the contract has become enforceable.

An application for the grant of an exemption must be sent to the competent disclosure office before the transaction concerned has been carried out as, according to art. 20 FBC-Ordinance, no exemption can be granted if an application is made after the transaction has already been carried out[62].

If the parties are not sure whether a certain transaction is subject to the notification obligation or whether an exemption may be granted, the parties concerned may ask the competent notification office for a ruling which allows the parties to correctly plan their transaction and to fulfill their obligations.

62 The disclosure office of the SWX accepts, however, applications which are sent at the time the transaction is carried out.

~~11.~~2. PROCEDURE AND CONTENT OF NOTIFICATIONS; SANCTIONS

- *Each Swiss stock exchange has to designate a disclosure office to which notifications are directed and which accepts the rights on exemptions and examines whether the notifications are actually published.*

- *A notification must clearly identify the person or group which notifies and the number of shares held by such person or group.*

- *The notification must be sent to the company and the competent disclosure office within 4 stock market days after the event which triggered the notification obligation. The company must publish the notification within 2 stock market days.*

- *Violations of the notification obligation are punished with fines which can amount to up to 200% of the difference between the value of the interest owned by the shareholder and the last shareholding he has properly declared.*

~~11.1~~2.1 Procedure

Each Swiss stock exchange according to art. 22 FBC-Ordinance must designate a disclosure office ("Offenlegungsstelle") to which notifications are directed and which also monitors the publication of such notifications by the companies concerned. Such disclosure office also handles any application for exemptions.

If a person files an application for an exemption with a disclosure office, the disclosure office issue only a recommendation and not an order. However, uch recommendation becomes binding if the person concerned accepts it. If the applicant notifies the notification office in writing within 5 stock market days that it does not accept the recommendation, the Federal Banking Commission issues a binding order. Within the same deadline i.e. 5 stock market days, the Federal Banking Commission may, however, also takeover the procedure i.e. *ex* *officio* and replace the recommendation of the disclosure office with a binding order.

According to art. 21 FBC-Ordinance the disclosure office may issue rulings if a party seeks an advance decision on situations where the notification obligation is unclear or on the possibility of obtaining an exemption. In view of the heavy sanctions which may be imposed for violations of the notification obligation, it can be very important for the parties to clear such issues before they enter into a transaction. As the Federal Banking Commission has the right to takeover a procedure the disclosure offices will for complex situations, however, always contact the Federal Banking Commission before they render a ruling.

~~11.2~~2.2 Content of a Notification

According to art. 17 FBC-Ordinance a notification must contain the following information:

- Full name and address of the person submitting the notification[63].

- Names of the members of a group and the kind of agreement which constitutes the group concerned.

- Class and number of shares held by the person or group concerned and the voting rights connecting with such securities; the characteristics of conversion rights, call or put options if the notification covers also such rights.

[63] In case of a company a responsible contact person must also be identified.

- A description of the event or transaction which led to the notification obligation; should the conclusion of a contract and its consummation not take place on the same date, both dates have to be disclosed in the notification.

The disclosure office of the SWX has developed a notification form which considerably facilitates a notification as such form lists all the information a notification must contain[64].

~~11.3~~2.3 Deadlines on Publication

According to art. 18 FBC-Ordinance a notification must be submitted to the company and the disclosure office of the stock exchange on which the shares concerned are listed within 4 stock market days after the event triggered the notification obligation. The company must publish the notification within 2 stock market days after receipt in the Swiss Commercial Gazette and an electronic medium which distributes stock market information (Reuters, Bloomberg etc.).

~~11.4~~2.4 Sanctions

According to art. 41 SESTA persons who fail to comply with the notification obligation are punished with a fine which may amount to 200% of the difference between the new shareholding held by the person who is subject to a notification obligation and the last shareholding such person has declared. Such fine may therefore reach amounts which are far above any other fines which may be imposed for violations of the stock market act.

[64] Such form can be down-loaded from SWX Homepage; www.swx.com.

~~B.~~C. SERVICES OF WALDER WYSS

Walder Wyss furnishes the following services in connection with public offerings and notification obligation:

- Advice to tender offerors on the development of takeover strategies.

- Advice on defense mechanisms in Articles of Incorporation.

- Advice to target companies on defense and takeover attempts.

- Legal and tax advice in connection with tender offers.

- The drafting of transaction agreements, tender offer prospectus and corporate documents necessary for a tender offer.

- Advice to shareholders and companies with regard to notification obligations.