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# Ordinance of the Takeover Board on Public Takeover Offers

B-HBS1-TAK-300/E, Version, 01.04.1998

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## Table of Contents

Chapter 1: General Provisions .....	1
Art. 1 Objective (Arts 1 and 28 letter c, SESTA) .....	1
Art. 2 Equity securities (Art. 2 letters a and e, SESTA) .....	1
Art. 3 Recommendations (Art. 23 para. 3, SESTA) .....	1
Art. 4 Exceptions (Art. 28, SESTA) .....	2
Art. 5 Rejection of recommendations (Art. 23 para. 4, SESTA) .....	2
Art. 6 Time limit for rescission of a prohibited offer (Arts 26 and 28 letter e, SESTA) .....	2
Chapter 2: Prior Announcement of an Offer .....	2
Art. 7 Principle and contents (Art. 28 letter a, SESTA) .....	2
Art. 8 Publication (Art. 28 letter a, SESTA) .....	3
Art. 9 Effects (Art. 28 letter a, SESTA) .....	3
Chapter 3: Offer .....	3
Art. 10 Equal treatment (Arts 24 para. 2 and 28 letter c, SESTA) .....	3
Art. 11 Action in concert and organized groups (Arts 24 para. 3 and 28 letter f, SESTA) .....	4
Art. 12 Obligations of persons cooperating with the offeror (Arts 24 para. 3 and 28 letter f, SESTA) .....	4
Art. 13 Conditions of the offer (Art. 28 letter b, SESTA) .....	5
Art. 14 Duration of the offer (Arts 27 para. 2 and 28 letter e, SESTA) .....	5
Art. 15 Modification of an offer (Art. 28 letter e, SESTA) .....	5
Art. 16 Withdrawal of an offer (Art. 28 letter e, SESTA) .....	6
Chapter 4: Offer Prospectus .....	6
Section 1: General Provisions .....	6
Art. 17 Principles (Arts 24 para. 1 and 28 letter b, SESTA) .....	6
Art. 18 Publication of the offer (Arts 24 para. 1 and 28 letter b, SESTA) .....	6
Section 2 :Contents .....	6
Art. 19 Information on the offeror (Arts 24 para.1 and 28 letter b, SESTA) .....	6
Art. 20 Information on offer financing (Arts 24 para.1 and 28 letter b, SESTA) .....	7
Art. 21 Information on the subject matter and price of the offer (Arts 24 para.1 and 28 letter b, SESTA) .....	7

---

Art. 22 Offer for several classes of equity securities (Arts 24 para.1 and 28 letter b, SESTA) .....	7
Art. 23 Information on the offeree company (Arts 24 para. 1 and 28 letter b, SESTA) .....	7
Art. 24 Additional information in the case of public exchange offers (Arts 24 para.1 and 28 letter b, SESTA) .....	8
Chapter 5: Review of the Offer .....	8
Art. 25 Review body (Arts 25 and 28 letter d, SESTA) .....	8
Art. 26 Tasks of review body prior to publication of the offer (Arts 25 and 28 letter d, SESTA)....	8
Art. 27 Tasks of review body after publication of the offer (Arts 25 and 28 letter d, SESTA) .....	9
Art. 28 Cooperation with the Takeover Board (Arts 25 and 28 letter d, SESTA) .....	9
Chapter 6: Report of the Board of Directors of the Offeree Company .....	9
Art. 29 Principles (Art. 29 paras 1 and 3, SESTA) .....	9
Art. 30 Specific information (Art. 29 paras 1 and 3, SESTA) .....	9
Art. 31 Conflicts of interest (Art. 29 paras 1 and 3, SESTA) .....	10
Art. 32 Publication of the report (Art. 29 paras 1 and 3, SESTA) .....	10
Art. 33 Modification of the offer (Art. 29 paras 1 and 3, SESTA) .....	10
Chapter 7: Defence Measures by the Offeree Company .....	10
Art. 34 Obligation to notify (Art. 29 paras 2 and 3, SESTA) .....	11
Art. 35 Unlawful defence measures (Art. 29 para. 2, SESTA) .....	11
Art. 36 Improper defence measures (Art. 29 para. 3, SESTA) .....	11
Chapter 8: Notification of Transactions .....	11
Art. 37 Obligation to notify of the offeror (Art. 31 paras 1 and 2, SESTA) .....	11
Art. 38 Obligation to notify of the significant shareholders (Art. 31 paras 1 and 2, SESTA) .....	12
Art. 39 Application of the Banking Commission's ordinance (Art. 31, SESTA) .....	12
Art. 40 Contents of the Report (Art. 31 para. 5, SESTA) .....	12
Art. 41 Time of the report (Art. 31 para. 5, SESTA) .....	12
Art. 42 Publication (Arts 28 letter c and 31, SESTA) .....	12
Chapter 9: Publication of Results .....	13
Art. 43 Publication of interim result (Arts 27 and 28 letter c, SESTA) .....	13
Art. 44 Conditional offer (Arts 27 and 28 letter c, SESTA) .....	13
Art. 45 Additional acceptance period (Arts 27 para. 2 and 28 letter c, SESTA) .....	13

---

Art. 46 Publication of final result (Arts 27 and 28 letter c, SESTA).....	14
Chapter 10: Competing Offers .....	14
Art. 47 Principles applicable in the event of competing offers (Art. 30, SESTA) .....	14
Art. 48 Equal treatment of offerors by the offeree company (Art. 30, SESTA).....	14
Art. 49 Competing offer (Art. 30, SESTA).....	14
Art. 50 Effect of a competing offer on the initial offer (Art. 30, SESTA).....	15
Art 51 Withdrawal or modification of the initial offer (Art. 30, SESTA).....	15
Chapter 11: Procedure.....	15
Art. 52 Delegations (Art. 23 paras 1, 4 and 5, SESTA) .....	15
Art. 53 Parties (Art. 23 paras 1, 4 and 5, SESTA) .....	15
Art. 54 Participation in proceedings (Art. 23 paras 1, 4 and 5, SESTA).....	16
Art. 55 Principles of procedure (Art. 23 paras 1, 4 and 5, SESTA) .....	16
Art. 56 Confidentiality; languages (Art. 23 paras 1, 4 and 5, SESTA).....	16
Art. 57 Information (Art. 23 paras 1, 4 and 5, SESTA) .....	16
Art. 58 Preliminary submissions (Art. 23 paras 1, 4 and 5, SESTA) .....	17
Art. 59 Written Proceedings (Art. 23 paras 1, 4 and 5, SESTA).....	17
Art. 60 Meeting with the parties (Art. 23 paras 1, 4 and 5, SESTA) .....	17
Art. 61 Participation of the offeree company (Art. 23 paras 1, 4 and 5, SESTA) .....	17
Art. 60 Fees (Art. 23 paras 1, 4 and 5, SESTA) .....	18
Chapter 12: Entry into Force.....	18
Art. 63.....	18

# Ordinance of the Takeover Board on Public Takeover Offers

(Takeover Ordinance -TB, O-TB)

of July 21, 1997

approved by the Federal Banking Commission on August 11, 1997

## Unofficial translation

*The Commission for Public Takeover Offers (Takeover Board),*

based upon Articles 23, 28, 29 paragraph 3, 30 paragraph 2 and 31 paragraph 5 of the Stock Exchange Act of March 24, 1995<sup>1</sup> (SESTA, hereinafter referred to as the Act),

decrees:

## Chapter 1: General Provisions

### Art. 1 Objective (Arts 1 and 28 letter c, SESTA)

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

### Art. 2 Equity securities (Art. 2 letters a and e, SESTA)

"Equity securities" within the meaning of this Ordinance shall be shares, participation certificates and bonus certificates, as well as conversion and acquisition rights attached to equity securities (hereinafter "option rights").

### Art. 3 Recommendations (Art. 23 para. 3, SESTA)

<sup>1</sup> The Takeover Board shall issue recommendations to the parties relative to each public takeover offer (the offer). These recommendations shall state whether the applicable provisions have been complied with. The Takeover Board may set an appropriate time limit for the parties to follow its recommendations.<sup>2</sup>

<sup>2</sup> The recommendations may relate to all aspects of an offer, or to certain points only.

AS 1997 2061

<sup>1</sup> SR 954.1

<sup>2</sup> Version in accordance with Art. I of the Ordinance of the Takeover Board of April 1, 1998, approved by the FBC on May 28, 1998, and brought into force on July 1, 1998 (AS 1998 1541).

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<sup>3</sup> If new facts come to light which significantly change the situation, the chairman of the Takeover Board may, by virtue of his office or at the request of a party, rule that the recommendation should be reviewed. In such cases, new proceedings shall be instituted.

<sup>4</sup> The Takeover Board shall publish its practice.

## **Art. 4 Exceptions** (Art. 28, SESTA)

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The Takeover Board may waive compliance with certain provisions of this Ordinance in special cases, provided that this is justified by overriding interests.

## **Art. 5 Rejection of recommendations** (Art. 23 para. 4, SESTA)

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<sup>1</sup> The parties may reject a recommendation by delivering a written statement to the Takeover Board no later than five trading days after receipt of the recommendation. The Takeover Board may extend this time limit.

<sup>2</sup> Any recommendation not rejected within the time limit specified under paragraph 1 above shall be deemed to be accepted by the parties.

<sup>3</sup> If a recommendation is rejected, not followed within the specified time limit or if an accepted recommendation is not complied with, the Takeover Board shall refer the case to the Banking Commission so that administrative proceedings may be initiated.<sup>3</sup>

<sup>4</sup> Where rejection or non-compliance concerns a single point, the Takeover Board may refer the case to the Banking Commission and ask it to make a decision on the point at issue only. The Commission may nevertheless decide to review the entire case.

<sup>5</sup> In any event, the case may be brought before the Takeover Board again if the Banking Commission so decides.

## **Art. 6 Time limit for rescission of a prohibited offer** (Arts 26 and 28 letter e, SESTA)

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Where an offer is prohibited, every recipient of the offer shall be entitled to repudiate the contract or rescind an executed sale in writing within one year after the decision becomes legally binding.

## **Chapter 2: Prior Announcement of an Offer**

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### **Art. 7 Principle and contents** (Art. 28 letter a, SESTA)

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

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<sup>3</sup> Version in accordance with Art. I of the Ordinance of the Takeover Board of April 1, 1998, approved by the FBC on May 28, 1998, and brought into force on July 1, 1998 (AS 1998 1541).

<sup>2</sup>The prior announcement shall include:

- a. the corporate name and registered office of the offeror;
- b. the corporate name and registered office of the offeree company;
- c. the equity securities to which the offer refers;
- d. the price of the offer;
- e. the time limits for publication and the duration of the offer;
- f. any conditions of the offer.

## **Art. 8 Publication** (Art. 28 letter a, SESTA)

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<sup>1</sup> The prior announcement shall be published in two or more newspapers in German and French so that the information is circulated nationwide.

<sup>2</sup> The prior announcement shall be sent to at least one of the principal electronic media specializing in stock market data.

## **Art. 9 Effects** (Art. 28 letter a, SESTA)

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<sup>1</sup> Within six weeks of publication of the prior announcement, the offeror shall publish an offer that complies with the terms of the prior announcement. The Takeover Board may extend this time limit, especially if the offeror must obtain authorization from a public authority (particularly an antitrust authority).

<sup>2</sup> In principle, the offeror may only change the price of the offer in the recipients' favour. The price of the offer may not be changed to their disadvantage unless :

- a. the offeree company has been subjected to a due diligence review and the change is objectively justified; or
- b. the offering price is in relation to a price still to be negotiated by the offeror within the framework of the acquisition of a significant holding.

<sup>3</sup>The date of the prior announcement shall replace the publication date for:

- a. the calculation of the price of a mandatory offer (Art. 32, SESTA);
- b. the obligation to notify transactions (Art. 31, SESTA, Arts 37 to 40 of this Ordinance)
- c. the defence measures of the offeree company (Art. 29 paras 2 and 3, SESTA, Arts 34 to 36 of this Ordinance).

## **Chapter 3: Offer**

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### **Art. 10 Equal treatment**

(Arts 24 para. 2 and 28 letter c, SESTA)

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<sup>1</sup> If an offer comprises several classes of equity securities, equal treatment shall apply to all securities included in the offer.

<sup>2</sup>The offer must cover all classes of listed equity securities of the offeree company. If, in addition, the offer includes unlisted equity securities of the offeree company, the principle of equal treatment shall also be applied to such securities.

<sup>3</sup> The offer must also comprise all equity securities resulting from the exercise of option rights until the expiry of the additional acceptance period (Art. 14 para. 5), but not necessarily the option rights themselves.

<sup>4</sup> If the offer includes equity securities whose acquisition would not entail the obligation to make an offer, the offeror may freely set the price of the offer. He shall ensure that a reasonable relationship is maintained between the prices of the various classes of equity securities. If the offeror cannot satisfy all acceptances, he must make allotments on a pro rata basis.

<sup>5</sup> If the offer includes equity securities whose acquisition would entail the obligation to make an offer, the offer must apply to all listed equity securities of the offeree company (Article 29 of the Stock Exchange Ordinance-FBC of June 25, 1997<sup>4</sup>; SESTO-FBC). The price of the offer must be in conformity with the provisions governing the obligation to make an offer (Article 32, SESTA, Articles 37-43. SESTO-FBC).<sup>5</sup>

<sup>6</sup> Once an offer is published, if the offeror acquires equity securities of the offeree company at a price higher than the offering price, that price shall be proposed to all recipients of the offer.

## **Art. 11 Action in concert and organized groups** (Arts 24 para. 3 and 28 letter f, SESTA)

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<sup>1</sup> Article 15 paras 1 and 2 of SESTO-FBC shall apply by analogy to persons who act in concert or form an organized group with the offeror for the purpose of making an offer.

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

## **Art. 12 Obligations of persons cooperating with the offeror** (Arts 24 para. 3 and 28 letter f, SESTA)

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<sup>1</sup> Persons who cooperate with the offeror pursuant to Article 11 must:

- a. be described in the offer prospectus (Art. 19 para. 1 letter d);
- b. comply with the transparency rules (Art. 23);
- c. comply with the rules on equal treatment (Art. 10 para. 6);
- d. comply with the rules of fairness (Art. 13 para. 1);
- e. comply with the rules on the obligation to notify transactions (Chapter 8).

<sup>2</sup> Persons who cooperate with the offeror shall be under no obligation to pay the offering prices, unless otherwise stated in the offer.

<sup>3</sup> Holdings in the offeree company of persons cooperating with the offeror shall be added to those of the offeror (Arts 19 para. 1 letters f and g, 43 para. 3 and 46).

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<sup>4</sup> SR 954.193

<sup>5</sup> Version in accordance with Art. I of the Ordinance of the Takeover Board of April 1, 1998, approved by the FBC on May 28, 1998, and brought into force on July 1, 1998 (AS 1998 1541).

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

(Art. 28 letter b, SESTA)

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<sup>1</sup> In principle, the offer may only be made subject to suspensive conditions over which the offeror has no decisive control. Where the nature of the suspensive conditions is such that a contribution from the offeror is required to bring them about, the offeror must take all reasonable steps to ensure that the conditions are brought about.

<sup>2</sup> On expiry of the offer, it must be clearly ascertained whether the conditions have been fulfilled.

<sup>3</sup> Under the terms of the offer, the offeror may reserve the right to waive certain conditions.

<sup>4</sup> With the approval of the Takeover Board, the offer may also be made subject to resolutive conditions, the failure of which shall only be clearly established once the offer has expired.

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

(Arts 27 para. 2 and 28 letter e, SESTA)

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<sup>1</sup> As a rule, the offer may be accepted only after a cooling-off period of ten trading days, starting from the date on which it is published.

<sup>2</sup> The Takeover Board shall, in principle, waive the cooling-off period if the offer is submitted for review prior to publication and if it includes the report of the Board of Directors of the offeree company.

<sup>3</sup> The offer shall remain open for at least 20 trading days. This period shall be reduced to ten trading days if:

- a. the offeror already holds the majority of voting rights in the offeree company before the offer is published; and
- b. the report of the Board of Directors of the offeree company is published in the offer.

<sup>4</sup> The offer shall not remain open for more than 40 trading days. A shorter offer period may be extended up to the maximum duration, provided the offeror has reserved the right to do so in the offer.

<sup>5</sup> If the offer is successful, the offeror shall grant the right of subsequent acceptance for a period of ten trading days after publication of the result (additional acceptance period). This rule shall also apply to unconditional offers.

<sup>6</sup> As a rule, execution shall take place no later than ten trading days after the close of the additional acceptance period. The offer prospectus shall state the time at which the offer is to be executed.

## **Art. 15 Modification of an offer**

(Art. 28 letter e, SESTA)

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<sup>1</sup> A published offer may not be modified unless such modification is on balance favourable to the recipients (e.g. higher offering price, removal of conditions).

<sup>2</sup> The modification of the offer shall be published in the same way as the initial offer.

<sup>3</sup> The modification may take place up to the expiry of the offer.

<sup>4</sup> However, if the modification is published less than ten trading days before expiry of the offer, the expiry date shall be postponed for a further ten trading days after publication of the modification. Both these time limits shall be reduced to five trading days if the report of the Board of Directors of the offeree company is published with the modification.

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## **Art. 16 Withdrawal of an offer**

(Art. 28 letter e, SESTA)

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A published offer may be withdrawn if the offeror has expressly reserved the right to do so by inserting one or more conditions pursuant to Article 13 in the offer.

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# **Chapter 4: Offer Prospectus**

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## **Section 1: General Provisions**

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### **Art. 17 Principles** (Arts 24 para. 1 and 28 letter b, SESTA)

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

<sup>2</sup> The offeror must submit the offer prospectus and, where applicable, the summary provided for in Article 18 para. 3 to the Takeover Board by the date of publication at the latest.

<sup>3</sup> These documents may be submitted to the Takeover Board before publication. In this case, the Board may waive the cooling-off period (Art. 14 para. 2).

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

(Arts 24 para. 1 and 28 letter b, SESTA)

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<sup>1</sup> The offer shall be published in two or more newspapers in German and French so that the information is circulated nationwide.

<sup>2</sup> The offer shall be sent to at least one of the principal electronic media specializing in stock market data.

<sup>3</sup> The publication may only consist of a summary of the offer with the essential information. It shall refer to the full prospectus, which must be made available to interested parties free of charge as of the publication date.

## **Section 2 :Contents**

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

(Arts 24 para.1 and 28 letter b, SESTA)

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<sup>1</sup> The offer prospectus shall give the following information, where applicable:

- a. the corporate name, registered office, capital and principal activities of the offeror;
- b. the identity of the shareholders or groups of shareholders who hold more than 5 per cent of the voting rights, and the percentage of their holdings;
- c. particulars of shareholders who directly or indirectly control the offeror, insofar as such information is essential for recipients of the offer to make their decision;

- d. particulars of persons acting in concert with the offeror (Art. 11), insofar as such information is essential for recipients of the offer to make their decision;
- e. the address at which the latest published annual accounts of the offeror are available;
- f. the share of the offeror in the voting rights and capital of the offeree company, whether or not such rights may be exercisable;
- g. the number of equity securities of the offeree company bought and sold by the offeror in the twelve months preceding the offer, stating the highest purchase price.

<sup>2</sup> For the information referred to under paragraph 1 letters f and g above, option rights shall be listed separately.

## **Art. 20 Information on offer financing**

**(Arts 24 para.1 and 28 letter b, SESTA)**

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<sup>1</sup> The offer prospectus shall provide information on the type of financing to be used as well as a declaration from the auditors confirming that the necessary funds are available.

<sup>2</sup> If the securities offered in exchange are not yet available, the offeror shall certify that all necessary measures for the procurement of the securities have been taken.

## **Art. 21 Information on the subject matter and price of the offer**

**(Arts 24 para.1 and 28 letter b, SESTA)**

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<sup>1</sup> The offer prospectus shall provide information on the capital of the offeree company and specify the equity securities subject to the offer; in the event of a partial offer, the maximum number of equity securities sought shall also be indicated.

<sup>2</sup> The offer prospectus shall state the price offered per equity security or the exchange ratio in the case of a public exchange offer.

## **Art. 22 Offer for several classes of equity securities**

**(Arts 24 para.1 and 28 letter b, SESTA)**

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<sup>1</sup> The offer prospectus shall explain briefly how the price and/or exchange ratios among the various classes of equity security were determined.

<sup>2</sup> The review body shall certify that the ratios in question are appropriate.

## **Art. 23 Information on the offeree company**

**(Arts 24 para. 1 and 28 letter b, SESTA)**

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<sup>1</sup> The offer prospectus shall provide information on:

- a. the offeror's general intentions concerning the offeree company;
- b. the agreements between the offeror, the offeree company and the latter's governing bodies and shareholders.

<sup>2</sup> The offeror shall certify in the offer prospectus that the offeree company has not communicated to the offeror, directly or indirectly, information on the of-

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ferree company that is not available publicly and could have a decisive influence on the decision of the recipients of the offer.

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

**(Arts 24 para.1 and 28 letter b, SESTA)**

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

<sup>2</sup> The offer prospectus shall give the address at which the last three annual reports of the offeror or the company whose securities are offered in exchange may be obtained, as well as the latest interim report.

<sup>3</sup> The offer prospectus shall, in addition, provide information on significant changes in the offeror's assets and liabilities, financial position, earnings and prospects, or in those of the company whose securities are offered in exchange, since the last annual or interim report. If no such changes have taken place, this shall be stated in the prospectus.

<sup>4</sup> If the securities offered in exchange are listed, the offer prospectus shall give details on their performance over the last three years.

<sup>5</sup> If the securities offered in exchange are not listed on the main stock exchange, the offer prospectus shall contain an auditor's valuation of the securities offered in exchange. If the securities are listed on a second stock exchange, the stock exchange price shall be taken into account according to the liquidity of the market concerned.

<sup>6</sup> Securities offered in exchange which are listed on a foreign stock exchange shall only be considered as listed on the main stock exchange if the issuer publishes information equivalent to that required in Switzerland for listing on the main stock exchange.

## **Chapter 5: Review of the Offer**

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### **Art. 25 Review body (Arts 25 and 28 letter d, SESTA)**

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Securities dealers and auditors authorized to investigate securities dealers (Art. 18, SESTA) shall be entitled to review offers.

### **Art. 26 Tasks of review body prior to publication of the offer (Arts 25 and 28 letter d, SESTA)**

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<sup>1</sup> Prior to publication of an offer, the review body shall verify that the offer prospectus complies with the Act and the Ordinance. It shall check in particular:

- a. completeness and accuracy of the offer prospectus and of the summary provided for in Article 18 para. 3;
- b. compliance with the principle of equal treatment for recipients of the offer;
- c. financing of the offer and the availability of such financing.

<sup>2</sup> The review body shall draw up a brief report. The offeror shall publish this report in the offer prospectus.

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## **Art. 27 Tasks of review body after publication of the offer** (Arts 25 and 28 letter d, SESTA)

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<sup>1</sup> After publication of an offer, the review body shall verify:

- a. notifications of transactions pursuant to Article 31 of the Act;
- b. publications of final and interim results;
- c. proper execution of the completed offer;
- d. compliance with the provisions of the Act and the Ordinance throughout the offer period.

<sup>2</sup> The review body shall draw up a final report for the Takeover Board, indicating the factors on which it has based its review.

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## **Art. 28 Cooperation with the Takeover Board** (Arts 25 and 28 letter d, SESTA)

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<sup>1</sup> The review body shall provide the Takeover Board with all the information it requests to carry out its duties.

<sup>2</sup> If the review body has reason to believe that a violation of the Act or the Ordinance has been committed after publication of the offer, it shall inform the Takeover Board without delay and provide it with a special report.

<sup>3</sup> The Takeover Board may instruct the review body to carry out special investigations in connection with an offer.

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## **Chapter 6: Report of the Board of Directors of the Offeree Company**

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### **Art. 29 Principles** (Art. 29 paras 1 and 3, SESTA)

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<sup>1</sup> The report of the Board of Directors (hereinafter the report) shall contain all the information necessary for the recipients of the offer to make an informed decision.

<sup>2</sup> The published information shall be true and complete.

<sup>3</sup> The report may recommend acceptance or rejection of the offer; it may also discuss the advantages and disadvantages of the offer without making a recommendation.

<sup>4</sup> The report shall state its arguments clearly and present all the essential factors which have influenced the position.

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### **Art. 30 Specific information** (Art. 29 paras 1 and 3, SESTA)

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<sup>1</sup> The report shall indicate the intentions of each shareholder holding more than 5 per cent of the voting rights, if these are known to the Board of Directors.

<sup>2</sup>The report shall indicate, where appropriate, the defensive action, the offeree company intends to take and the resolutions passed by the general meeting pursuant to Article 29 para.2 of the Act.

<sup>3</sup>The report may omit some information if the legal auditors of the offeree company certify to the Takeover Board that this is justified by clearly overriding corporate interests, and if they describe those interests.

## **Art. 31 Conflicts of interest**

(Art. 29 paras 1 and 3, SESTA)

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<sup>1</sup>The report shall state whether any members of the Board of Directors or senior management have a conflict of interest.

<sup>2</sup>In particular, the report shall indicate :

- a. whether any members have entered into an agreement or maintain other ties with the offeror;
- b. whether any members were appointed upon the offeror's proposal; or
- c. whether any members are to be reappointed.

<sup>3</sup>In the event of a conflict of interest, the report shall describe the measures taken by the offeree company to prevent such conflict of interest from adversely affecting the recipients of the offer.

## **Art. 32 Publication of the report**

(Art. 29 paras 1 and 3, SESTA)

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

<sup>2</sup>If the report is not published in the offer prospectus, it shall be published at the latest on the fifteenth trading day after the announcement of the offer in at least two newspapers in which the offer appeared, so that it is available nationwide.

<sup>3</sup>The report shall also be sent to at least one of the main electronic media specializing in stock market data.

<sup>4</sup>If the Board of Directors decides to draw up a detailed report, it may only publish a summary containing a reference to the full report. This must be made available to interested parties free of charge as of the publication date.

## **Art. 33 Modification of the offer**

(Art. 29 paras 1 and 3, SESTA)

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<sup>1</sup>A new report by the Board of Directors, which may be brief, shall be published after any modification of the offer.

<sup>2</sup>The new report may be published with the modified offer.

<sup>3</sup>If the new report is not published with the modified offer, the time limit for publication specified in Article 32 para. 2 shall be reduced to eight trading days.

# **Chapter 7: Defence Measures by the Offeree Company**

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## **Art. 34 Obligation to notify**

(Art. 29 paras 2 and 3, SESTA)

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Once an offer is published, the offeree company shall notify the Takeover Board in advance of any defence measure it is considering.

## **Art. 35 Unlawful defence measures**

(Art. 29 para. 2, SESTA)

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<sup>1</sup> The assets and liabilities of the offeree company shall also include off-balance-sheet assets and liabilities, particularly those deriving from contracts which involve substantial commitments or risks.

<sup>2</sup> In particular, the following measures adopted by the Board of Directors without a resolution by the general meeting shall be unlawful:

- a. the sale or acquisition of the company's assets at a value or price of more than 10 per cent of the balance sheet total (on the basis of the latest annual or interim accounts, consolidated if appropriate);
- b. the sale or pledge of any part of the company or its intangible assets that constitute the main subject matter of the offer and are designated as such by the offeror;
- c. the conclusion of contracts with members of the Board of Directors or senior management providing for unusually high compensation payments in the event of their resignation from the company;
- d. the issue of shares on the basis of the company's authorized capital without a pre-emptive subscription right for shareholders, insofar as the decision of the general meeting creating the authorized capital does not expressly provide for a share issue in the case of an offer. The same rule shall apply to the issue of bonds with conversion or option rights on the basis of contingent capital with no pre-emptive subscription right for shareholders.

## **Art. 36 Improper defence measures**

(Art. 29 para. 3, SESTA)

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Defence measures which manifestly violate company law shall constitute improper measures pursuant to Art. 29 para. 3 of the Act.

# **Chapter 8: Notification of Transactions**

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## **Art. 37 Obligation to notify of the offeror**

(Art. 31 paras 1 and 2, SESTA)

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<sup>1</sup> As of publication of the offer and until expiry of the additional acceptance period, the offeror shall notify the Takeover Board and the stock exchange on which the securities are listed of any transactions he conducts in equity securities of the offeree company.

<sup>2</sup> In the case of a public exchange offer, the offeror shall also notify any transactions in securities offered in exchange.

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<sup>3</sup> The same notification obligations shall apply to any person acting in concert with the offeror (Art. 11).

## **Art. 38 Obligation to notify of the significant shareholders** (Art. 31 paras 1 and 2, SESTA)

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<sup>1</sup> Any person who directly or indirectly holds at least 5 per cent of the voting rights in the offeree company or in the company whose securities are offered in exchange, whether these rights are exercisable or not, shall be subject to the obligation to notify provided for in this chapter.

<sup>2</sup> Any person acting in concert with a third party pursuant to Article 15, SESTO-FBC<sup>6</sup>, and thus holding at least 5 per cent of the voting rights - whether exercisable or not - in the offeree company shall be subject to the same obligation to notify.

## **Art. 39 Application of the Banking Commission's ordinance** (Art. 31, SESTA)

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Articles 9 to 16, SESTO-FBC<sup>7</sup>, shall apply by analogy to the notification obligations provided for in this chapter.

## **Art. 40 Contents of the Report** (Art. 31 para. 5, SESTA)

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<sup>1</sup> The overall daily report shall contain the following transactions:

- a. stock exchange transactions in equity securities;
- b. over-the-counter transactions in equity securities.

<sup>2</sup> The Takeover Board may demand a detailed daily report on the volume of each transaction, together with the time and the price.

<sup>3</sup> Where transactions appear questionable, the Takeover Board may also require the identity of the securities dealers to be disclosed.

<sup>4</sup> Transactions which also include option rights shall be listed separately.

## **Art. 41 Time of the report** (Art. 31 para. 5, SESTA)

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Reports shall reach the Takeover Board and the stock exchange no later than 12 noon on the trading day following the transaction.

## **Art. 42 Publication** (Arts 28 letter c and 31, SESTA)

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<sup>1</sup> The Takeover Board may recommend publication of the transactions reported if :

- a. they have a significant influence on the price of the equity securities targeted or offered in exchange; and

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<sup>6</sup> SR 954.193

<sup>7</sup> SR 954.193

b. publication is necessary to ensure fair dealing in the market.

<sup>2</sup> The Takeover Board shall notify its recommendation to the person who reported the transactions in question.

<sup>3</sup> Sales of equity securities in the offeree company by the offeror shall be published without a specific recommendation.

<sup>4</sup> If the person who notified the transactions refuses to publish, the Takeover Board may publish the information itself.

<sup>5</sup> Publication shall be effected through at least one of the main electronic media specializing in stock market data.

## **Chapter 9: Publication of Results**

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### **Art. 43 Publication of interim result**

**(Arts 27 and 28 letter c, SESTA)**

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<sup>1</sup> On the first trading day after expiry of the offer, the interim result of the offer shall be notified as precisely as possible to the stock exchange, the Takeover Board and at least one of the principal electronic media specializing in stock market data.

<sup>2</sup> No later than four trading days after expiry of the offer, the precise interim result shall be published in the same newspapers which carried the announcement of the offer.

<sup>3</sup> The publication of the interim result shall state:

- a. the number of equity securities acquired by the offeror between the publication and expiry date of the offer, expressed in absolute figures and as a percentage of the equity securities included in the offer (success rate);
- b. the offeror's overall stake at the expiry date of the offer (voting rights – whether exercisable or not – and capital), expressed as a percentage of all the equity securities of the offeree company (percentage of shares held).

<sup>4</sup> If the offeree company maintains several classes of equity securities, the information shall be provided for each category of equity security included in the offer and for the entire capital.

### **Art. 44 Conditional offer** (Arts 27 and 28 letter c, SESTA)

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If the offer is conditional, the publication of the interim result shall state whether the conditions have been fulfilled.

### **Art. 45 Additional acceptance period**

**(Arts 27 para. 2 and 28 letter c, SESTA)**

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<sup>1</sup> If the offer was successful, the publication shall refer to the right of subsequent acceptance (Art. 14 para. 5).

<sup>2</sup> The additional acceptance period of ten trading days shall only start upon publication of the interim result.

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## **Art. 46 Publication of final result**

(Arts 27 and 28 letter c, SESTA)

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<sup>1</sup> The publication of the result after expiry of the additional acceptance period shall give the offeror's overall stake (voting rights – whether exercisable or not – and capital), expressed as a percentage of all the equity securities of the offeree company (percentage of shares held).

<sup>2</sup> Article 43 paras 1, 2 and 4 shall also apply to publication of the final result.

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## **Chapter 10: Competing Offers**

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### **Art. 47 Principles applicable in the event of competing offers** (Art. 30, SESTA)

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<sup>1</sup> If several offers to purchase equity securities are published, the last offer shall be termed the competing offer and the preceding offers shall be termed the initial offers.

<sup>2</sup> If not otherwise provided in this chapter, the competing offer shall be subject to all the rules applicable to public takeover offers.

<sup>3</sup> Recipients of the offers must be able to choose freely, regardless of the order in which the offers are published.

<sup>4</sup> The total duration of the process shall not be excessive. The Takeover Board may in particular determine the maximum duration of the various offers and shorten the time limits within which they may be modified or withdrawn.

### **Art. 48 Equal treatment of offerors by the offeree company** (Art. 30, SESTA)

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

<sup>2</sup> Inequality of treatment with regard to individual offerors shall be possible only with the agreement of the Takeover Board, if the offeree company proves an overriding corporate interest.

### **Art. 49 Competing offer** (Art. 30, SESTA)

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<sup>1</sup> The competing offer shall be published no later than the third trading day prior to expiry of the initial offer.

<sup>2</sup> If the Takeover Board contemplates waiving or reducing the cooling-off period pursuant to Art. 14 para. 2, it shall take the other offerors' interests into account.

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

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## **Art. 50 Effect of a competing offer on the initial offer** (Art. 30, SESTA)

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

<sup>2</sup> If a competing offer is published, the recipients may revoke their acceptance of the initial offer until expiry of the latter.

<sup>3</sup> The initial offer may be withdrawn or modified on the conditions provided for in Article 51. It may no longer be extended voluntarily.

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## **Art 51 Withdrawal or modification of the initial offer** (Art. 30, SESTA)

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<sup>1</sup> The initial offer may be withdrawn or modified no later than the fifth trading day before its expiry, including any extension of the offer period pursuant to Art. 50 para. 1.

<sup>2</sup> Modification of the initial offer shall be subject to all the other conditions applicable to publication of an offer, with the exception of the cooling-off period, which shall be reduced to three trading days.

<sup>3</sup> A modified offer shall in principle remain open for ten trading days. It may not be extended voluntarily.

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## **Chapter 11: Procedure**

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### **Art. 52 Delegations** (Art. 23 paras 1, 4 and 5, SESTA)

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<sup>1</sup> Each offer shall be examined by a delegation of the Takeover Board, which in principle shall be composed of three members. The delegation shall act in the name of the Takeover Board.

<sup>2</sup> The chairman of the Takeover Board shall appoint a delegation as soon as an offer or draft offer is submitted to the Takeover Board. He shall appoint the chairman of the delegation and may also appoint a deputy and one or more substitute members.

<sup>3</sup> The chairman of the delegation shall represent the Takeover Board in the matter of the offer under review.

<sup>4</sup> The delegation may consult the Takeover Board at any time on specific issues.

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### **Art. 53 Parties** (Art. 23 paras 1, 4 and 5, SESTA)

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<sup>1</sup> The offeror, the persons acting in concert with the offeror (Art. 11) and the offeree company shall be parties to the proceedings.

<sup>2</sup> Where there are several offers, each offeror shall be party to the proceedings.

<sup>3</sup> The parties may be represented or accompanied by advisors of their choice.

## **Art. 54 Participation in proceedings**

(Art. 23 paras 1, 4 and 5, SESTA)

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<sup>1</sup> Anyone asserting a direct and legitimate interest in the offer may participate in the proceedings and put forward objections.

<sup>2</sup> In particular, the persons referred to in Article 38 shall have a direct and legitimate interest.

<sup>3</sup> In principle, participants shall make their submissions in writing only and shall base their arguments on publicly available documents. If they assert a legitimate interest in consulting further documents, the Takeover Board shall decide after taking account of all the interests involved.

## **Art. 55 Principles of procedure**

(Art. 23 paras 1, 4 and 5, SESTA)

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<sup>1</sup> The proceedings shall ensure compliance with the principle of equal treatment before the law and the right to be heard; the details of the right to be heard shall be determined by the delegation, based on established case law and all the interests involved.

<sup>2</sup> The procedure shall be simple and take account of the short time limits within which the recommendations must be issued.

<sup>3</sup> The delegation shall inform the parties of the procedural rules to be applied in the case in question.

<sup>4</sup> The grounds for the recommendations shall be stated briefly; they shall be notified to the parties, in principle by telefax.

<sup>5</sup> The Federal Act on Administrative Procedure<sup>8</sup> shall not apply.

## **Art. 56 Confidentiality; languages**

(Art. 23 paras 1, 4 and 5, SESTA)

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<sup>1</sup> The Takeover Board shall observe secrecy on the offers submitted to it prior to publication and with respect to the information it receives in this context. Its deliberations shall be secret.

<sup>2</sup> The working languages of the Takeover Board are German, French, Italian, and English.

## **Art. 57 Information** (Art. 23 paras 1, 4 and 5, SESTA)

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<sup>1</sup> Any interested party may request information from the Takeover Board concerning the interpretation of the provisions of the Act and the Ordinance; for this purpose, he shall furnish relevant details concerning the matter on which the information is sought.

<sup>2</sup> Information provided by the chairman of the Takeover Board shall not be binding on the Takeover Board. If the petitioner establishes a legitimate interest in obtaining a response binding on the Takeover Board, the chairman shall appoint a delegation.

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<sup>8</sup> SR 172.021

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## **Art. 58 Preliminary submissions**

(Art. 23 paras 1, 4 and 5, SESTA)

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An offeror may submit a draft of a prior announcement, a draft offer prospectus and, where applicable, a draft summary of the offer for review by a delegation prior to publication.

## **Art. 59 Written Proceedings**

(Art. 23 paras 1, 4 and 5, SESTA)

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<sup>1</sup> In simple cases, the proceedings shall be conducted in written form without meeting with the parties.

<sup>2</sup> The delegation may request the parties to provide additional documents or information. In all cases, the parties shall have the opportunity to present their observations on relevant issues.

<sup>3</sup> Communications by one party to the delegation shall in principle be addressed to all parties. However, the delegation may also hear the parties separately and receive documents in confidence. The factors on which a recommendation is based shall be communicated to all parties.

<sup>4</sup> The delegation may request the review body to carry out specific audits and prepare a special report for it. The delegation shall inform the parties thereof.

## **Art. 60 Meeting with the parties**

(Art. 23 paras 1, 4 and 5, SESTA)

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<sup>1</sup> The delegation may convene a meeting of the parties and the review body of the offer.

<sup>2</sup> The parties shall address their communications to the delegation in writing within the time limits set by the delegation.

<sup>3</sup> Article 59 para. 3 shall also apply to the meeting with the parties.

<sup>4</sup> In principle, the delegation shall not hear witnesses or seek expert opinions.

<sup>5</sup> Minutes of the meeting shall be drawn up and sent to the participants.

## **Art. 61 Participation of the offeree company**

(Art. 23 paras 1, 4 and 5, SESTA)

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<sup>1</sup> If the offer is submitted to the delegation before publication, the offeror may request that the offeree company participate in the proceedings. If the offeree company does participate, the delegation shall issue a recommendation pursuant to Article 3.

<sup>2</sup> If the offeror does not request that the offeree company participate in the proceedings, or if the offeree company does not participate, the delegation shall merely make a provisional recommendation. The proceedings shall be reopened after publication of the offer.

<sup>3</sup> If the offer is submitted to the delegation after publication, it shall request the offeree company to participate in the proceedings.

## **Art. 60 Fees** (Art. 23 paras 1, 4 and 5, SESTA)

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<sup>1</sup> Each offeror shall be charged a fee for review of the offer by the Takeover Board when the offer is submitted.

<sup>2</sup> The fee shall be calculated proportionately to the total amount of the offer:

- a. 0.50 per mil up to CHF 200 million;
- b. 0.20 per mil of the amount between CHF 200 and 500 million;
- c. 0.10 per mil of the amount in excess of CHF 500 million.<sup>9</sup>

<sup>3</sup> The fee shall be no less than CHF 20,000 and no more than CHF 200,000. In simple cases, it may be reduced by 50 per cent at the most. In exceptional cases, the delegation may set a fee of less than CHF 20,000.<sup>10</sup>

<sup>4</sup> In the case of an exchange offer for securities listed on the main stock exchange, the total amount of the offer shall be established on the basis of the average opening price of these securities during the ten trading days prior to submission of the offer to the Takeover Board. For exchange offers concerning other securities, the fee shall be determined on the basis of the valuation by the review body.

<sup>5</sup> In special cases, particularly where the offeree company causes additional work for a delegation, the latter may decide that the offeree company should also pay a fee. The fee shall be calculated according to the amount of additional work involved, but shall not exceed the fee paid by the offeror.

<sup>6</sup> A fee shall also be charged for the examination of requests for information (Article 57) and of requests concerning the subjection of a transaction to the regulations on public takeover offers, the obligation to make an offer and the granting of special exemptions from that obligation (Article 32 para. 2, SESTA and Article 34, SESTO-FBC<sup>11</sup>). According to the complexity of the case and the work required, the fee may be up to CHF 50,000. It shall be deducted from the fee specified in paras 1-4 if the applicant makes an offer after a delegation has ruled on the matter.<sup>12</sup>

## **Chapter 12: Entry into Force**

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### **Art. 63**

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This Ordinance shall enter into force on January 1, 1998.

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<sup>9</sup> Version in accordance with Art. I of the Ordinance of the Takeover Board of April 1, 1998, approved by the FBC on May 28, 1998, and brought into force on July 1, 1998 (AS 1998 1541).

<sup>10</sup> Version in accordance with Art. I of the Ordinance of the Takeover Board of April 1, 1998, approved by the FBC on May 28, 1998, and brought into force on July 1, 1998 (AS 1998 1541).

<sup>11</sup> SR 954.193

<sup>12</sup> Version in accordance with Art. I of the Ordinance of the Takeover Board of April 1, 1998, approved by the FBC on May 28, 1998, and brought into force on July 1, 1998 (AS 1998 1541).