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Ordinance of the Takeover Board on Public Takeover Offers (Takeover Ordinance, TOO)

of 21 August 2008

Approved by the Swiss Federal Banking Commission on 24 September 2008

The Takeover Board,

based on Article 23, Article 28, Article 29, paragraph 3, Article 30, paragraph 2, Article 31, paragraphs 3 and 5, Article 32, paragraph 2, and Article 33a of the Stock Exchange Act of 24 March 1995¹
(hereinafter referred to as “the Act”),

decrees:

Chapter 1: General Provisions

Article 1 Purpose

(Article 1, Article 28c, Stock Exchange Act)

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

Article 2 Definitions

(Articles 2a and 2e, Stock Exchange Act)

In this Ordinance:

- a. *equity securities* refers to shares, holding certificates and bonus certificates.
- b. *financial instruments* refers to financial instruments as defined in Article 15 of the Stock Exchange Ordinance of the Swiss Financial Market Supervisory Authority dated 25 September 2008²

¹ SR 954.1

² SR 954.193

Article 3 Duties

(Article 23, paragraph 3, Article 32, paragraph 2 and Article 33a, paragraph 1, Stock Exchange Act)

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

² It enacts in the form of decisions.

Article 4 Exemptions

(Article 28, Stock Exchange Act)

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

² It may in particular exempt the offeror³ from compliance with individual provisions governing public takeover offers if its offer relates to its own equity securities and:

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

Chapter 2: Prior announcement of an offer

Article 5 Principle and content

(Article 28a, Stock Exchange Act)

¹ The offeror may announce an offer before the publication of the offer prospectus.

² The prior announcement shall contain the following information:

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

³ As the offerors are predominantly legal entities, they are referred to throughout the text as “it” or “they”.

Article 6 Publication

(Article 28a, Stock Exchange Act)

¹ The prior announcement must be drawn up in German and French and circulated throughout Switzerland by its publication in at least one German and one French-language newspaper.

² It must be submitted to the Takeover Board and to at least two of the principal electronic media that provide stock market information (information providers).

³ It must be submitted at least 90 minutes before the start of trading or after the close of trading on the stock exchange on which the shares of the offeree company are listed.

⁴ The Takeover Board shall post the prior announcement on its website.

⁵ Along with the prior announcement, the Takeover Board must be given details of the representative of the company in Switzerland.

Article 7 Legal effects

(Article 28a, Stock Exchange Act)

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

² The offer prospectus may contain modifications in comparison with the prior announcement only if these are generally favourable to the recipients (e.g. an increase in the offer price, removal of conditions).

³ The date on which the prior announcement is issued is decisive for:

- a. the calculation of the minimum price (Article 32, Stock Exchange Act, Article 9, paragraph 6 of this Ordinance);
- b. the obligation to give notice of the transactions (Article 31, Stock Exchange Act, Articles 38 to 43 of this Ordinance);
- c. the defensive measures of the offeree company (Article 29, paragraphs 2 and 3, Stock Exchange Act, Articles 35 to 37 of this Ordinance);
- d. the duty of the offeror to comply with the best price rule (Article 10);
- e. the calculation of the time limit in accordance with Article 19, paragraph 1g.

Article 8 Applicable date

(Article 28a, Stock Exchange Act)

¹ In principle, the legal effects of the prior announcement cited in Article 7 apply from the date of the publication of the prior announcement in the press.

² The legal effects shall apply from the time the prior announcement is sent to the Takeover Board and the information provider if the prior announcement is published in the press within three trading days.

Chapter 3: Offer

Article 9 Principle of equal treatment

(Article 24, paragraph 2, and Article 28c, Stock Exchange Act)

¹ The principle of equal treatment applies to all categories of equity securities and to all financial instruments to which the offer relates.

² The offer must cover all categories of listed equity securities of the offeree company. If the offer also covers unlisted equity securities of the offeree company or financial instruments, the principle of equal treatment shall also apply to these.

³ The offeror shall ensure that an equitable relationship is preserved between the prices offered for the various equity securities and financial instruments.

⁴ The offer must also cover equity securities that derive from financial instruments before the end of the additional acceptance period (Article 14, paragraph 5), but not necessarily the financial instruments themselves.

⁵ If the offer includes equity securities whose acquisition would not entail an obligation to make an offer, the offeror is free to specify the offer price. In doing so, it must ensure that an equitable relationship is preserved between the prices offered for the various equity securities and financial instruments. If the offeror is unable to satisfy all acceptance declarations, it must satisfy them on a pro rata basis.

⁶ If the offer includes equity securities whose acquisition would entail an obligation to make an offer, the offer must cover all listed equity securities of the offeree company. The offer price must comply with the legal provisions governing mandatory offers.

Article 10 Best price rule

(Article 24, paragraph 2 and Article 28c, Stock Exchange Act)

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

² The best price rule also applies to the acquisition of financial instruments and to offers relating to such instruments.

Article 11 Action in concert or as an organised group

(Article 24, paragraph 3 and Article 28f, Stock Exchange Act)

¹ Article 10, paragraphs 1 and 2 of FINMA Stock Exchange Ordinance⁴ applies analogously to persons who act in concert or as an organised group with the offeror with a view to making an offer.

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

⁴ SR 954.193

Article 12 Obligations of persons co-operating with the offeror

(Article 24, paragraph 3 and Article 28f, Stock Exchange Act)

¹ Persons who co-operate with the offeror in accordance with Article 11 must comply with the following rules:

- a. the rules governing transparency (Article 23);
- b. the rules governing equal treatment, and in particular the best price rule (Article 10);
- c. the rules governing fairness (Article 13, paragraph 1);
- d. the rules governing the obligation to give notice of the transactions (Chapter 8).

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

³ Interests in the offeree company held by persons co-operating with the offeror shall be added to the holdings of the offeror (Article 19, paragraphs 1f and 1g, Article 44, paragraph 3 and Article 47).

Article 13 Conditions of the offer

(Article 28b, Stock Exchange Act)

¹ If the offeror has a legitimate interest, the offer may be made subject to conditions. For mandatory offers, Article 36 of the FINMA Stock Exchange Ordinance⁵ shall apply.

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

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

⁴ The offeror may waive any or all of the conditions at any time. The implementation of the offer shall result in all outstanding conditions being waived.

⁵ Normally, the offeror must on publication of the definitive interim result (Article 44, paragraph 2) declare that:

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

⁶ It may postpone this declaration until the implementation of the submitted offer if:

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

⁵ SR 954.193

Article 14 Duration of the offer

(Article 27, paragraph 2 and Article 28e, Stock Exchange Act)

- ¹ The offer may be accepted only after expiry of a cooling-off period.
- ² This cooling-off period shall normally last 10 trading days from the date of publication of the offer prospectus, and may be extended or shortened by the Takeover Board.
- ³ The offer must remain open for at least 20 trading days. This period may be shortened at the request of the offeror to 10 trading days if:
 - a. the offeror holds the majority of the voting rights in the offeree company before the publication of the offer; and
 - b. the report of the board of directors of the offeree company is published in the offer prospectus.
- ⁴ The offer may remain open for no more than 40 trading days. A shorter offer period may be extended to 40 trading days if the offeror reserves the right to do this in the offer. An extension beyond 40 trading days requires the consent of the Takeover Board, which may adjust the schedule for an offer if this is justified by overriding interests.
- ⁵ If the offer is successful, the offeror must grant a right of retrospective acceptance of the offer for a period of 10 trading days from the date of publication of the definitive interim result (supplementary acceptance period). The foregoing also applies to an unconditional offer.
- ⁶ Normally, the offer must be implemented no later than 10 trading days after the end of the additional acceptance period. If the offer remains subject to conditions (Article 13, paragraph 5), implementation may be postponed with the prior consent of the Takeover Board. The time when the offer will be implemented must be indicated in the offer prospectus.

Article 15 Amendment of an offer

(Article 28e, Stock Exchange Act)

- ¹ A published offer may only be amended if the modification concerned is generally favourable to the recipients (e.g. an increase of the offer price, removal of conditions).
- ² Article 18, paragraphs 1 and 3 shall apply to the publication of the amended offer.
- ³ The amended offer must be published no later than the start of trading on the last trading day of the offer period.
- ⁴ If an amended offer is published less than 10 trading days before the expiry of the offer, the offer period shall be extended so that the offer remains open for at least 10 trading days from the date of publication of the amended offer. Both these time limits shall be reduced to 5 trading days if the report of the board of directors of the offeree company is published with the amended offer.

Article 16 Time limit for withdrawal from a prohibited offer

(Article 26 and Article 28b, Stock Exchange Act)

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

Chapter 4: Offer prospectus

Section 1: General provisions

Article 17 Principles

(Article 24, paragraph 1 and Article 28b, Stock Exchange Act)

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

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

³ The offeror must submit the offer prospectus and any amendments thereto to the Takeover Board for inspection by not later than the day of publication.

Article 18 Publication of the offer

(Article 24, paragraph 1 and Article 28b, Stock Exchange Act)

¹ The offer prospectus and any amendments thereto must be drawn up in German and French and circulated throughout Switzerland by being published in at least one German and one French-language newspaper.

² Instead of the complete offer prospectus, the offeror may arrange for notice of the offer to be published in at least one German and one French-language newspaper, provided it contains the following information:

- a. the information in accordance with Article 5, paragraph 2;
- b. the information in accordance with Article 30, paragraph 3, provided the report of the board of directors is included in the offer prospectus;
- c. the exact Internet address at which the full offer prospectus is accessible free of charge in German and French, as well as information as to where the prospectus may be obtained without delay and free of charge;
- d. in the event of prior review of the offer (Article 59): the statement of the grounds for the decision by the Takeover Board;
- e. if applicable, the information in accordance with Article 25, paragraph 2;
- f. additional information required by the Takeover Board.

³ The offer prospectus, notice of the offer and any amendments to the offer prospectus must also be sent to the Takeover Board and at least two information providers at least 90 minutes before the start of trading or after the close of trading on the stock exchange on which the equity securities of the offeree company are listed. The

Takeover Board shall post the offer prospectus, the notice of the offer and any amendments to the offer prospectus on its website.

Section 2: Content

Article 19 Information about the offeror

(Article 24, paragraph 1 and Article 28b, Stock Exchange Act)

¹ The offer prospectus shall contain the following information:

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

² For the information referred to in paragraphs 1f and 1g, the financial instruments must be listed separately and the information referred to in Article 21, paragraphs 2 and 3 of the FINMA Stock Exchange Ordinance⁶ must be disclosed.

Article 20 Information about the financing of the offer

(Article 24, paragraph 1 and Article 28b, Stock Exchange Act)

¹ The offer prospectus shall contain the essential details of the financing of the offer as well as confirmation from the review body that the offeror has taken the necessary measures to ensure that the required funds are available on the implementation date.

² If securities offered in exchange are not yet available, the review body must confirm that the offeror has taken all the necessary measures to ensure that the securities are available on the implementation date.

Article 21 Information about the subject matter of the offer and the price

(Article 24, paragraph 1 and Article 28b, Stock Exchange Act)

¹ The offer prospectus shall contain information on the capital of the offeree company and specify the equity securities and financial instruments covered by the offer.

⁶ SR 954.193

In the case of a partial offer, it shall also specify the maximum number of equity securities and financial instruments that are to be acquired.

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

Article 22 Offer for two or more categories of equity securities and for financial instruments

(Article 24, paragraph 1 and Article 28b, Stock Exchange Act)

¹ The offer prospectus shall explain how the ratio between the prices of different categories of equity securities and financial instruments, or the related exchange ratio, has been calculated.

² The review body shall confirm that the ratios are appropriate.

Article 23 Information about the offeree company

(Article 24, paragraph 1 and Article 28b, Stock Exchange Act)

¹ The offer prospectus shall contain information regarding:

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

² The offeror must confirm in the offer prospectus that it has not received information about the offeree company directly or indirectly from the latter that is not in the public domain and which could have a decisive influence on the decision of the recipients of the offer.

Article 24 Additional information in the case of public exchange offers

(Article 24, paragraph 1 and Article 28b, Stock Exchange Act)

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

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

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

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

⁴ The offer prospectus shall also contain information about significant changes in the assets and liabilities, financial position, earnings and prospects of the company whose securities are being offered in exchange, that have occurred since the last annual or interim report. If no such changes have occurred, this must be confirmed in the offer prospectus.

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

⁶ If the securities offered in exchange are not listed on a stock exchange, or if their market is illiquid, the offer prospectus must contain a valuation of the securities offered in exchange (Article 44, FINMA Stock Exchange Ordinance⁷).

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

Article 25 Other information

(Article 24, paragraph 1 and Article 28b, Stock Exchange Act)

¹ If the offer has been subject to a prior review (Article 59), the offer prospectus shall contain the statement of grounds for the decision by the Takeover Board.

² If applicable, the offer prospectus shall contain details of the time limit and conditions by which a shareholder who furnishes proof of a holding of at least 2 percent of the voting rights in the offeree company, irrespective of whether they are exercisable:

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

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

Chapter 5: Review of the offer

Article 26 Review body

(Article 25 and Article 28d, Stock Exchange Act)

¹ Securities traders and audit companies licensed to audit securities traders (Article 26, FINMAG) shall be authorised to examine offers.

⁷ SR 954.193

² The review body must be independent of the offeror, the offeree company and any persons acting with them.

Article 27 Duties of the review body prior to publication of the offer

(Article 25 and Article 28d, Stock Exchange Act)

¹ Prior to the publication of the offer, the review body shall verify whether the offer prospectus complies with the Act and the ordinances, as well as with any decisions by the Takeover Board pronounced in connection with the offer. It shall in particular verify:

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

² The review body shall prepare a brief report, which the offeror must publish in the offer prospectus.

³ If the offeror amends the offer or the offer prospectus (Article 15 and Article 17, paragraph 2), the review body shall also prepare a brief report on the modifications concerned, and this report must be published with the amended offer.

Article 28 Duties of the review body after publication of the offer

(Article 25 and Article 28d, Stock Exchange Act)

¹ After publication of the offer, the review body shall verify whether the provisions of the Act and ordinances, as well as the decisions by the Takeover Board pronounced in connection with the offer, have been complied with throughout the offer period. It shall in particular verify:

- a. notifications of the transactions referred to in Article 31 of the Act;
- b. the publication of interim and final results;
- c. whether the completed offer has been implemented in the proper manner;
- d. compliance with the best price rule (Article 10) from date of publication of the offer until six months after expiry of the supplementary acceptance period.

² The review body shall submit a final report to the Takeover Board, specifying the principles on which it has based its review.

Article 29 Co-operation with the Takeover Board

(Article 25 and Article 28d, Stock Exchange Act)

¹ The review body shall provide the Takeover Board with all the information that the latter requests in order to carry out its duties.

² If the review body has reason to believe that the Act, ordinances or decisions issued by the Takeover Board in connection with the offer have been infringed after

publication of the offer, it shall inform the Takeover Board of this immediately and submit a special report to the latter.

³ The Takeover Board may instruct the review body to carry out special reviews and to provide corresponding reports.

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

Article 30 Principles

(Article 29 paragraphs 1 and 3, Stock Exchange Act)

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

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

³ The report may recommend that the offer be accepted or rejected. It may, however, also point out the advantages and disadvantages of the offer without making a recommendation.

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

⁵ If the recommendation of the board of directors of the offeree company is based on the assessment of a third party (a fairness opinion), this shall form an integral part of the report. The basis for the assessment, the method of assessment and the applied parameters must be disclosed. The report shall contain details of the precise Internet address where the fairness opinion is accessible free of charge in German and French, as well as the location where the opinion may be obtained without delay and free of charge.

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

Article 31 Special information

(Article 29, paragraphs 1 and 3, Stock Exchange Act)

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

² It shall, if applicable, indicate the defensive measures that the offeree company intends to take or has already taken, and mention the resolutions passed by the general meeting in application of Article 29, paragraph 2 of the Act.

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

Article 32 Conflict of interests

(Article 29, paragraphs 1 and 3, Stock Exchange Act)

¹ The report must state whether any member of the board of directors or the management board has a conflict of interests.

² It must in particular state whether any member of the board of directors:

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

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

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

Article 33 Publication of the report

(Article 29, paragraphs 1 and 3, Stock Exchange Act)

¹ The report may be published in the offer prospectus.

² If the report is not already published in the offer prospectus, it must be circulated throughout Switzerland no later than 15 trading days after publication of the offer prospectus by being published in at least one German and one French-language newspaper in which the offer was published,.

³ Instead of the complete report, a summary of the report may be published in at least one German and one French-language newspaper in which the offer was published, provided the summary contains at least the following information:

- a. the corporate name and registered office of the offeror and the offeree company;
- b. the information in accordance with Article 30, paragraph 3;

- c. the precise Internet address at which the complete report in German and French is accessible without delay and free of charge, and the location where it may be obtained without delay and free of charge.

⁴ The report and any summary of the report must also be sent to the Takeover Board and at least two information providers, at the latest 90 minutes before the start of trading or after the close of trading on the stock exchange on which the equity securities of the offeree company are listed. The Takeover Board shall post the report and the any summary of the report on its website.

⁵ Paragraphs 1, 2 and 4 shall apply analogously to the publication of amendments to the report.

Article 34 Amendment of the offer
(Article 29, paragraphs 1 and 3, Stock Exchange Act)

¹ Following any amendment of the offer, a new report by the board of directors must be published. This report may be issued in summarised form.

² The new report may be published with the amended offer.

³ If the report is not published with the amended offer, the time limit for publication specified in Article 33, paragraph 2 shall be reduced to 8 trading days.

Chapter 7: Defensive measures by the offeree company

Article 35 Reporting obligation
(Article 29, paragraphs 2 and 3, Stock Exchange Act)

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

Article 36 Unlawful defensive measures
(Article 29, paragraph 2, Stock Exchange Act)

¹ The assets and liabilities of the offeree company shall also include the off-balance-sheet items, and in particular those deriving from contracts that involve significant risks or commitments.

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

- a. sells or acquires assets the value or price of which exceeds 10 percent of the balance sheet total, or that contribute more than 10 percent to the earning power of the company (based on the latest, annual or interim accounts, including consolidated accounts if applicable);
- b. sells or pledges any parts of the business or its intangible assets that form part of the main subject matter of the offer and have been specified as such by the offeror;

- c. enters into contracts with members of the board of directors or management board that provide for unusually high remuneration payments in the event of their leaving the company;
- d. issues shares on the basis of the authorised capital without granting subscription rights to the shareholders, unless the resolution of the general meeting establishing the authorised capital expressly provides for the issue of shares in the event of an offer. The foregoing also applies to the issue of bonds with conversion or option rights based on contingent capital with no pre-emptive subscription right for shareholders;
- e. buys or sells its own equity securities or securities in the company whose securities are being offered in exchange, or related financial instruments;
- f. issues or grants rights to acquire its equity securities, and in particular conversion or option rights.

³ The transactions specified in paragraphs 2e and 2f are permitted if they are carried out:

- a. as part of an employee equity participation scheme; or
- b. in fulfilment of obligations arising from financial instruments that were entered into before publication of the offer.

Article 37 Inadmissible defensive measures

(Article 29, paragraph 3, Stock Exchange Act)

Defensive measures that clearly infringe against the provisions of company law shall be regarded as inadmissible measures as defined in Article 29, paragraph 3 of the Act.

Chapter 8: Notification of transactions

Article 38 Reporting obligation of involved parties

(Article 31, paragraphs 1 and 2, Stock Exchange Act)

¹ From the date of publication of the offer until the end of the supplementary acceptance period, all parties to the proceedings must notify the Takeover Board and the relevant disclosure authority about:

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

² Anyone acting in concert with the offeror (Article 11) is subject to the same reporting obligation.

Article 39 Reporting obligation of major shareholders

(Article 31, paragraphs 1, 2, 3 and 5, Stock Exchange Act)

The Takeover Board may rule that the reporting obligation mentioned in this Chapter shall also apply to:

- a. anyone who directly or indirectly holds at least 3 percent of the voting rights, irrespective of whether they are exercisable, in the offeree company or the company whose securities are being offered in exchange;
- b. anyone acting in concert with third parties in accordance with Article 10 of the FINMA Stock Exchange Ordinance⁸ and thus holding at least 3 percent of the voting rights in accordance with paragraph a.

Article 40 Application of FINMA Stock Exchange Ordinance

(Article 31, Stock Exchange Act)

Articles 9 to 18 of the FINMA Stock Exchange Ordinance⁹ shall apply analogously to the reporting obligation provided for in this Chapter.

Article 41 Content of reports

(Article 31, paragraph 5, Stock Exchange Act)

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

- a. subject matter of the transaction (equity securities or financial instruments with particulars in accordance with Article 21, paragraphs 2 and 3 of the FINMA Stock Exchange Ordinance¹⁰);
- b. nature of the transaction (acquisition, sale, securities lending and comparable transactions provided for in Article 14, FINMA Stock Exchange Ordinance, exercise of financial instruments, etc.);
- c. price;
- d. time of conclusion;
- e. whether executed on or off-exchange and identity of the securities traders;
- f. the form and number of all equity securities or financial instruments and attached voting rights held by the person required to notify at the end of the day.

Article 42 Time of notification

(Article 31, paragraph 5, Stock Exchange Act)

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

⁸ SR 954.193

⁹ SR 954.193

¹⁰ SR 954.193

Article 43 Publication

(Article 28c and Article 31, Stock Exchange Act)

The Takeover Board shall publish the reported transactions on its website.

Chapter 9: Publication of result

Article 44 Publication of interim result

(Article 27 and Article 28c, Stock Exchange Act)

¹ On the first trading day following expiry of the offer period, the offeror shall report the provisional interim result of the offer as precisely as possible to the disclosure authority, the Takeover Board and at least two information providers. The Takeover Board shall post the provisional interim result on its website.

² No later than 4 trading days following expiry of the offer, the definitive interim result must be published in the same newspapers in which the offer was published. The Takeover Board shall post the definitive interim result on its website.

³ The report on the interim result must contain:

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

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

Article 45 Conditional offer

(Article 27 and Article 28c, Stock Exchange Act)

In the case of a conditional offer, the reports on the definitive interim and final results must in each case state whether the conditions have been fulfilled.

Article 46 Supplementary acceptance period

(Article 27, paragraph 2 and Article 28c, Stock Exchange Act)

¹ If the offer was successful, the report must draw attention to the right of subsequent acceptance within 10 trading days (Article 14, paragraph 5).

² This supplementary acceptance period of 10 trading days begins with the date of publication of the report on the definitive interim result.

Article 47 Publication of the final result

(Article 27 and Article 28c, Stock Exchange Act)

¹ On expiry of the supplementary acceptance period, notification must be about the following:

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

² Article 44 shall also apply.

Chapter 10: Competing offers

Article 48 Applicable principles in the event of two or more offers

(Article 30, Stock Exchange Act)

¹ If two or more offers to acquire equity securities are published, the last offer is the competing offer and the previous offer is the initial offer”.

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

³ If the minimum price provisions apply to the competing offer, the stock exchange price in accordance with Article 32, paragraph 4 of the Stock Exchange Act is based on the volume-weighted average price of the stock exchange transactions in the last 60 trading days before:

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

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

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

Article 49 Equal treatment of the offerors by the offeree company

(Article 30, Stock Exchange Act)

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

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

Article 50 Publication

(Article 30, Stock Exchange Act)

¹ A competing offer may be published by means of a prior announcement or an offer prospectus no later than the last trading day of the offer period of the initial offer.

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

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

Article 51 Legal effects

(Article 30, Stock Exchange Act)

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

² Following publication of a competing offer, the recipients may revoke their acceptance declarations of the initial offer at any time up to its expiry.

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

Article 52 Amendment of initial and competing offers

(Article 30, Stock Exchange Act)

¹ An offer may be amended no later than the fifth trading day prior to its expiry, including any extension of the offer period in accordance with Article 51, paragraph 1.

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

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

Chapter 11: Potential offer

Article 53

(Article 28a, Stock Exchange Act)

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

- a. publish an offer for the offeree company; or

- b. publicly declare that for 6 months it will neither make an offer nor exceed the shareholding threshold that entails an obligation to make an offer.

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

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

⁴ Provided it is advantageous to the recipients of the offer, an offer from a potential offeror that is published later may be deemed to have been the subject of a prior announcement at the time of disclosure in accordance with paragraph 1 if the potential offeror:

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

Chapter 12: Proceedings

Article 54 Committees

(Article 23, paragraphs 1 and 5, Article 28, Stock Exchange Act)

¹ The decisions of the Takeover Board shall be issued by a committee, which shall normally comprise three members and shall act on behalf of Takeover Board.

² The President of the Takeover Board shall appoint the committee together with its chairperson and, if necessary, deputy chairperson. The President or the chairperson of the committee may appoint up to two substitute members.

³ The committee issues the decisions in the proceedings for which it has been formed.

⁴ The committee may consult the Takeover Board at any time on specific questions.

Article 55 Secretariat

(Article 23, paragraph 1 and Article 28g, Stock Exchange Act)

¹ The Takeover Board has a permanent Secretariat.

² The Secretariat prepares the business of the Takeover Board, makes proposals to it and implements its decisions. It deals directly with participants in proceedings, third parties and authorities.

³ The Takeover Board may instruct the Secretariat to review additional transactions.

⁴ The Secretariat may provide information on the interpretation of the Act and the ordinance provisions that regulate public takeover offers if the person concerned:

- a. provides the Secretariat with the required factual information; and
- b. proves that he or she has a legitimate interest.

⁵ The Takeover Board is not bound by information provided by the Secretariat.

Article 56 Parties in proceedings

(Article 23, paragraphs 1 and 5, Article 28g, Article 33b, paragraphs 2 and 3, Stock Exchange Act)

¹ The offeror, persons acting in concert with the offeror (Article 11) and the offeree company all have party status to the proceedings.

² If there are two or more offers, each offeror has party status.

³ A shareholder providing evidence of a holding of at least 2 percent of the voting rights in the offeree company, irrespective of whether they are exercisable (a qualified shareholder) shall be granted party status if he or she:

- a. requests the Takeover Board to be granted the same in accordance with Article 57; or
- b. files an appeal in accordance with Article 58.

⁴ The holding referred to in paragraph 3 must exist from the following time:

- a. in proceedings relating to the review of the offer (Articles 59 and 60): from the date of publication of the prior announcement or, if no prior announcement has been published, from the date of publication of the offer prospectus;
- b. in proceedings relating to the obligation to make an offer (Article 61): from the date of publication of the opinion of the board of directors.

Article 57 Petition by a qualified shareholder

(Article 33b, paragraph 3, Stock Exchange Act)

¹ A petition by a qualified shareholder to be granted party status must be received by the Takeover Board within 5 trading days from:

- a. date of publication of the offer prospectus or, if the first decision by the Takeover Board on the offer is published before the offer prospectus, after publication of that decision; or
- b. date of publication of the opinion of the board of directors of the offeree company in the procedure relating to the obligation to make an offer (Article 61).

² At the same time as the petition is made, the applicant must furnish proof of the holding.

³ The Takeover Board may at any time request proof that the shareholder continues to hold at least 2 percent of the voting rights in the offeree company, irrespective of whether they are exercisable.

⁴ Party status remains valid in relation to any further decisions issued in connection with the offer in question, provided the holding in accordance with Article 56, paragraph 3 continues to exist.

Article 58 Appeal by a qualified shareholder

(Article 23, paragraphs 1 and 5, Article 28g, Stock Exchange Act)

¹ A qualified shareholder who has yet to participate in the proceedings may file an appeal with the Takeover Board:

- a. against the first decision issued by the Takeover Board on the offer, provided this decision is published before or at the same time as the publication of the offer prospectus: within 5 trading days of the publication of the decision;
- b. against a decision on the obligation to make an offer (Article 61): within 5 trading days of the publication of the opinion of the board of directors of the offeree company.

² A qualified shareholder who has claimed party status in good time, but who could not be consulted before the decision was issued, may file an appeal within 5 trading days after publication of the decision.

³ The appeal must contain a petition and a summary of the legal grounds, as well as proof of the holding in accordance with Article 56, paragraphs 3 and 4.

⁴ If the appeal is admissible, the Takeover Board shall issue a decision after hearing the parties.

Article 59 Prior review of the offer

(Article 23, paragraphs 1 and 5, Article 28g, Stock Exchange Act)

¹ The offeror may submit the draft of a prior announcement or offer prospectus to the Takeover Board for review before publication.

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

Article 60 Subsequent review of the offer

(Article 23, paragraphs 1 and 5, Article 28g, Stock Exchange Act)

¹ If the prior announcement or the offer prospectus is published without a prior review, the Takeover Board shall open proceedings and invite the parties to state their opinions.

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

Article 61 Procedure relating to the obligation to make an offer

(Article 28g, Article 32, paragraph 2, Stock Exchange Act, Article 39, FINMA Stock Exchange Ordinance)

¹ If an application is submitted to the Takeover Board for an exemption from the obligation to make an offer or for a declaration that the obligation to make an offer does not apply, the Takeover Board shall open proceedings and invite the parties to state their opinions.

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

³ If the Takeover Board ascertains that there is no obligation to make an offer, or if it grants a special exemption, it shall require the offeree company to publish:

- a. the opinion of its board of directors;
- b. the statement of the grounds for the decision of the Takeover Board; and
- c. notice of the time limit and conditions by which a qualified shareholder may file an appeal against the decision of the Takeover Board.

⁴ The opinion must be issued in German and French and circulated throughout Switzerland by means of publication in at least one German and one French-language newspaper.

⁵ Instead of the complete opinion, a summary of the opinion may be published in at least one German and one French-language newspaper, provided it contains at least the following information:

- a. the corporate name and registered office of the offeree company, plus the particulars of the applicants;
- b. the subject matter of the application and the related decision of the board of directors;
- c. the exact Internet address at which the complete opinion in German and French is accessible, and the location where it may be obtained without delay and free of charge;
- d. the statement of the grounds for the decision of the Takeover Board;
- e. a notice of the time limit and conditions by which a qualified shareholder may file an appeal against the decision of the Takeover Board.

⁶ The complete opinion or any summary thereof must also be sent to at least two information providers no later than 90 minutes before the start of trading or after the close of trading on the stock exchange on which the equity securities in the offeree company are listed. The Takeover Board shall post the complete opinion and any summary thereof on its website.

Article 62 Reports

(Article 23, paragraph 1 and Article 28g, Stock Exchange Act)

¹ Anyone may report matters of relevance to the law on takeovers to the Takeover Board.

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

³ A person submitting a report shall not be granted party status.

Article 63 Procedural principles

(Article 23, paragraphs 1 and 5, Article 28g, Article 33b, paragraphs 4 and 5, Stock Exchange Act)

- ¹ The proceedings shall be straightforward and take account of the short time limits within which the decisions are issued.
- ² The proceedings shall in principle be conducted in writing.
- ³ The committee or the President of the Takeover Board shall inform the parties about the progress of the proceedings.
- ⁴ The President of the Takeover Board or the chairperson of the committee may call the parties and the review body to a meeting. Minutes shall be taken of the deliberations, and shall be sent to the involved parties.
- ⁵ The special aspects of the exchange of correspondence are governed by Article 33b, paragraph 5 of the Act and Article 7, FINMA Stock Exchange Ordinance¹¹.
- ⁶ The legal provisions governing the suspension of time limits do not apply.
- ⁷ The public and the parties shall be excluded from the deliberations of the Commission and its committees.

Article 64 Official secrecy

(Article 23, paragraphs 1 and 5, Article 28g, Stock Exchange Act)

The Takeover Board and its employees shall be bound by official secrecy.

Article 65 Publications

(Article 23, paragraphs 1 and 5, Article 28g, Stock Exchange Act)

- ¹ The Takeover Board shall publish its case law.
- ² It may publish circulars, notices and opinions as required.

Article 66 Languages

(Article 23, paragraphs 1 and 5, Article 28g, Stock Exchange Act)

- ¹ The working languages of the Takeover Board are German, French, Italian and English.
- ² The decisions shall be issued in one of the official languages, normally the language spoken at the Swiss headquarters of the offeree company.

Article 67 Time limits

(Article 23, paragraph 1 and Article 28g, Stock Exchange Act)

- ¹ For the calculation of time limits, Article 8 of FINMA Stock Exchange Ordinance¹² shall apply.

¹¹ SR 954.193

¹² SR 954.193

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

Article 68 Contesting decisions

(Article 33c, Stock Exchange Act)

In accordance with Article 33c of the Act, an appeal against decisions of the Takeover Board may be filed with the Swiss Financial Market Supervisory Authority (FINMA).

Article 69 Fees

(Article 23, paragraphs 1 and 5, Article 28g, Stock Exchange Act)

¹ The Takeover Board shall charge each offeror a fee for the review of the offer when the offer is submitted.

² The fee shall be calculated as follows, based on the total amount of the offer:

- a. 0.05 percent up to 200 million Swiss francs;
- b. 0.02 percent between 200 and 500 million Swiss francs;
- c. 0.01 percent of the amount over 500 million Swiss francs.

³ The fee shall amount to a minimum of 20,000 francs and a maximum of 200,000 Swiss francs. In simple cases, the fee may be reduced by up to 50 percent, and in exceptional cases the committee may specify a fee of less than 20,000 Swiss francs.

⁴ If an offer is made for the exchange of securities that are listed on a stock market, the total amount of the offer shall be determined based on the volume-weighted average price of the stock exchange transactions in the 60 trading days before the submission of the offer or the prior announcement to the Takeover Board. For illiquid or unlisted securities, the fee shall be determined on the basis of the valuation by the review body.

⁵ In special cases, and in particular if the offeree company or a qualified shareholder causes additional work for the Takeover Board, the Takeover Board may also require the offeree company or the qualified shareholder to pay a fee. This fee shall amount to a minimum of 20,000 Swiss francs, but shall not exceed the fee that the offeror is required to pay.

⁶ A fee shall also be charged for the review of requests for information and for the review of applications relating to the requirement to offer (Article 32, paragraph 2 of the Stock Exchange Act, Article 39 of the FINMA Stock Exchange Ordinance¹³). This fee shall, depending on the complexity of the case and the work involved, amount to a maximum of 50,000 Swiss francs. If the applicant makes an offer after a committee has made its decision, this fee shall be deducted from the fee provided for in paragraphs 1 to 4.

⁷ The Takeover Board may request advance payment of the expected fee from any party.

Article 70 Regulations

(Article 23, paragraph 1 and Article 28g, Stock Exchange Act)

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

Chapter 13: Entry into force

Article 71 Repeal of current legislation

(Article 23, paragraph 1 and Article 28g, Stock Exchange Act)

The Ordinance of the Takeover Board dated 21 July 1997¹⁴ on Public Takeover Offers is herewith repealed.

Article 72 Entry into force

(Article 23, paragraph 1 and Article 28g, Stock Exchange Act)

This Ordinance enters into force on 1 January 2009.

21 August 2008

Takeover Board

President: Luc Thévenoz

¹⁴ AS 1997 2061, 1998 1541

