

Update

Newsflash April 2013

Amendment of the Swiss Tender Offer Rules

In September 2012, the Swiss Parliament amended the Federal Act on Stock Exchanges and Securities Trading (SESTA), in particular regarding the rules applicable to public tender offers. On 10 and 11 April 2013, the Federal Council and the Takeover Board (TOB) published the regulations implementing the new law which will enter into force on 1 May 2013.

This newsletter summarises certain important aspects of the amended rules.

Extension of the Scope of Application of the Tender Offer Rules

Under the current takeover law, in effect until 30 April 2013, the Swiss tender offer rules apply if the target company is a Swiss company whose equity securities are at least partly listed in Switzerland. Under the revised SESTA, the scope of the Swiss takeover rules will be extended to include foreign companies that have a main listing for their equity securities on a Swiss stock exchange. A main listing is deemed to exist where the relevant foreign target company is subject to the same listing obligations vis-à-vis a Swiss stock exchange as listed Swiss companies. Swiss stock exchanges are required to publish a list of the foreign companies that fall into this category. If the takeover rules of another jurisdiction apply as well, the application of the Swiss rules may be waived if there is a conflict and the foreign rules offer the same level of protection for the investors as the Swiss rules.

Abolition of the Possibility to pay Control Premiums ahead of Tender Offers

The takeover law in effect until 30 April 2013 provides that the price offered in a mandatory public tender offer or in a voluntary offer which, if successful,

would trigger the obligation to submit a mandatory offer (change of control offer), must at least equal the volume-weighted average share price of the last 60 trading days prior to the offer (60 day VWAP) and not be lower than 75% of the highest price paid by the offeror for equity securities of the target company in the twelve months preceding the offer. As a consequence, under the old rules the offeror was permitted to pay a higher price than the offer price, in particular a control premium, in advance of its offer.

The new rules entering into effect on 1 May 2013 abolish the possibility to acquire shares of the target at a premium ahead of a tender offer. Under the revised SESTA, the offer price of a mandatory offer or a change of control offer must at least equal the higher of the 60 day VWAP or the highest price paid by the offeror for equity securities of the target in the twelve months preceding the offer. This also means that the offeror will have to carefully consider stock exchange purchases of target shares prior to the offer, since the acquisition of one single share above the envisaged offer price will in principle trigger the obligation to offer the higher price under the tender offer.

Cash Alternative in Voluntary Exchange Offers

Under the Swiss takeover law, a mandatory tender offer must be an all cash offer or, if it is an exchange offer, include a cash alternative. The rules in effect until 30 April 2013 also provide that a cash alternative must be offered in voluntary exchange offers if the offeror acquires equity securities of the target company for a cash consideration from the publication of the offer until six months after the expiration of the additional acceptance period.

The new tender offer rules do not change the duty to offer a cash alternative in mandatory exchange offers. However, the provisions on cash alternatives in voluntary exchange offers have been amended. As from 1 May 2013, a cash alternative must be offered in voluntary exchange offers in two scenarios, namely: (i) if the offeror acquires shares or other equity securities of the target for a cash consideration from the publication until the settlement of the offer; or (ii) in the event of a change of control offer, where the offeror has acquired equity securities of the target representing more than 10% of the share capital during the last twelve months prior to the offer. As a result, an offeror who intends to submit a voluntary exchange offer will no longer be able to build-up a stake in excess of 10% prior to launching the offer unless it is prepared to offer a full cash alternative in addition. However, the new rules now also explicitly state that the cash alternative does not necessarily have to be of the same value as the securities offered in the exchange offer.

New Sanctions for Breaches of Tender Offer Duty

Swiss law imposes a mandatory tender offer duty upon any person that exceeds the threshold of one third (or the higher threshold set forth in the articles

of association) of the voting rights of a listed company. As a sanction, the rules in effect until 30 April 2013 provide that the competent court may, upon application, suspend the voting rights of the shareholder concerned. There were no criminal sanctions available so far.

Under the revised SESTA, the competence to suspend the voting rights of a shareholder in case of an (alleged) breach of the tender offer duty is conferred upon the TOB. In addition, the TOB may enjoin the shareholder (allegedly) in breach from acquiring further shares of the target. Both measures may be imposed by the TOB *ex officio* if there are sufficient indications that a breach has occurred, and only until the situation has been clarified and the shareholder concerned has, if required, actually submitted a mandatory bid. In addition, the new law provides as an independent penalty a fine of up to CHF 10 million for any intentional breach of the tender offer duty.

Amended Rules regarding Publication of Offer Documents

Under the revised rules, the offer documents must still be prepared in German and French. Additionally, the rules now explicitly provide that, in case the pre-announcement is published or circulated to investors in an additional language such as English, all other offer documents (including the fairness opinion) must also be published in such additional language. Further, the offeror will have to ensure that such additional versions are consistent with the German and the French versions.

Under the rules in effect until 30 April 2013, the offer prospectus must be simultaneously delivered to at least two information service providers (such as

Bloomberg or Reuters) and be published in two Swiss nation-wide newspapers in German and French. The amended rules provide that all offer documents, including the offer prospectus, must be published on the offeror's website and delivered to the information service providers simultaneously, followed by the publication in the newspapers within three trading days. This new rule aims at alleviating concerns regarding leaks and insider dealing existing under the former rules. As a result of the new rules, there may be more offers in the future where the prospectus is the first offer document published at the time of the announcement of the transaction rather than the pre-announcement which has been the first offer document in the vast majority of cases in the past.

Increase of Share Ownership required for Qualified Shareholders to 3%

Contrary to the situation in other jurisdictions, Swiss takeover law provides the shareholders of the target company the right to become a party to the proceedings before the authorities and to challenge the decisions of the TOB. Under the revised SESTA which will enter into force on 1 May 2013, the threshold required to qualify for party status will be increased from currently 2% to 3% of the voting rights of the target company. As a result, the offeror and the target company will be in a position to identify all qualified shareholders prior to the launch of an offer since the lowest threshold for disclosing a significant interest in a Swiss listed company is 3%.

Duty of Qualified Shareholders to Notify Trades

Under Swiss takeover law, the offeror, the target company and other parties to the proceedings are

required to disclose within one trading day any transactions in equity securities of the target company (as well as transactions in securities offered in exchange offers) from the date of publication of the offer until the end of the additional acceptance period. The old rules also empowered the TOB to impose the same disclosure duty upon shareholders holding 3% or more of the voting rights of the target company (qualified shareholders). Under the revised rules, qualified shareholders will *per se* be subject to the notification duty without any order of the TOB being required. The disclosure will have to be made within one trading day.

Proceedings before the Federal Administrative Court

In order to accelerate the proceedings before the Federal Administrative Court, the amended takeover law provides that the proceedings and time limits will no longer come to a standstill during court holidays in takeover-related matters before the Federal Administrative Court. Further, the amended rules clarify that only persons who already participated in the proceedings before the TOB are entitled to challenge the TOB's decisions and to act as a party in the proceedings before the Swiss Financial Market Supervisory Authority (FINMA) and the Federal Administrative Court.

Entry into Effect and Transitional Regime

The new rules will enter into effect on, and be applicable as of, 1 May 2013. However, shareholders holding more than one third of the voting rights of a company abroad as of such date will be exempted from the mandatory tender duty as long as they do not exceed 50% of the voting rights.

Please do not hesitate to contact us in case of any questions or queries.

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