

# Update

## Newsflash December 2015

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### Amendment of the Swiss public takeover law as of January 1, 2016

**On January 1, 2016, simultaneously with the entry into force of the Financial Market Infrastructures Act, the revised Ordinance of the Takeover Board on Public Takeovers becomes effective. The Takeover Board has published the text of the new Ordinance on December 15, 2015. This newsflash summarizes the material changes resulting from the revision in the field of the public takeover law.**

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#### Overview

On January 1, 2016, the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA) and its implementing ordinances will enter into effect. Simultaneously, the Federal Act on Stock Exchanges and Securities Trading and its implementing ordinances will be repealed and the provisions on public takeovers will be integrated in the FMIA.

The new legal framework resulted in a need to revise the Ordinance of the Takeover Board (TOB) on Public Takeover Offers (TOO). On December 15, 2015, the TOB has published the revised wording of the TOO. The TOO will, on the one hand, be formally aligned with the FMIA and its implementing ordinances, but will, on the other hand, also undergo several substantive changes. The following are the most significant changes which will become effective on January 1, 2016:

- › The publication of the offer documents in the newspapers, the offer notice as well as the short report of the board of directors of the target company will be abandoned and replaced by a pure electronic publication of the offer documents.
  - › The publication of the offer documents in the electronic media will now be relevant for the beginning of, as well as for the compliance with, certain time limits in public takeover procedures.
  - › Under the new rules, electronic submissions in administrative proceedings before the TOB and the Swiss Financial Market Supervisory Authority (FINMA) have to be executed with a recognized electronic signature. A submission by simple e-mail is no longer possible in administrative proceedings.
  - › The report of the board of directors of the target company in the proceedings relating to an exemption from the tender duty or a declaration that the tender duty does not exist, is no longer mandatory (but can still be made voluntarily).
  - › Reliance on an exemption from the tender duty after an acquisition of shares by way of a donation, succession or partition of an estate, matrimonial property law or foreclosure has to be notified to the TOB. Such a notification was not required under the old rules.
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## **Publication of offer documents**

Under the TOO applicable until December 31, 2015, the offeror had to publish all offer documents, in particular the pre-announcement of the offer, the offer prospectus or a summary thereof, the definitive announcement of the interim result, the definitive announcement of the final result as well as potential amendments of the offer, in at least one German-language and one French-language newspaper with nationwide reach. The same rule applied to the report of the board of directors of the target company. The publication in the newspaper was relevant for the beginning of various time limits. The time limit of five trading days for the request of a qualified shareholder to become a party in the proceedings before the TOB, for instance, started on the date on which the offer prospectus was published in the newspapers.

The revision which becomes effective on January 1, 2016 abandons the publication of the offer documents in the newspapers, the offer notice as well as the short report of the board of directors of the target company. While the purpose of the publication in the newspapers was to ensure a wide distribution of the relevant information in the market, the TOB believes that a newspaper publication is no longer necessary and up to date due to the development of the electronic media. Based on similar arguments, SIX Swiss Exchange had already abandoned the listing notice and fully shifted to electronic media in March 2014.

Under the new rules, the parties of a takeover procedure have to distribute the offer documents through the following three channels:

- › The duty to publish the offer documents on the offeror's website or a website specifically established for the offer will not change.
- › As from January 1, 2016, the offer documents will have to be sent to the Swiss media, meaning editors of Swiss newspapers with nationwide reach (e.g. Neue Zürcher Zeitung, Tages Anzeiger, Agéfi), the significant news agencies active in Switzerland (e.g. awp financial news, SDA) as well as to the significant electronic media which distribute stock exchange information (e.g. Bloomberg, Reuters, Telekurs).

- › Finally and as already under the old rules, the offer documents will have to be delivered simultaneously to the TOB.

Whereas the distribution to two of the significant electronic media which distribute stock exchange information was sufficient until December 31, 2015, no such minimum number is set forth in the revised TOO. With this change, the TOB intends to ensure that the parties of a public takeover procedure do not limit the distribution to the minimum addressees required by law but that as many addressees as possible be informed. The TOB furthermore announced that it will define the circle of eligible significant media in a circular at a later time.

## **Beginning of and compliance with time limits**

Under the new rules, time limits for which the publication in the newspaper was relevant prior to the revision, will start or be complied with the electronic publication of the relevant offer document. As regards the practically relevant application of qualified shareholders to become a party to the proceedings before the TOB, the time limit for submitting the application will under the new rules start with the publication of the TOB ruling or the offer prospectus on the offeror's website or the dedicated offer website, respectively.

## **Correspondence in public takeover proceedings**

Under the old rules, electronic correspondence, meaning correspondence by simple e-mail, with FINMA and the TOB was permitted in public takeover proceedings. Accordingly, submissions by e-mail were common and recognized for purposes of complying with time limits.

Under the new rules, the ordinance on electronic transmission in administrative proceedings becomes applicable on electronic submissions. Said ordinance requires that electronic submissions be executed with a recognized electronic signature pursuant to the Federal Act on Certification Services in the Domain of the Electronic Signature. A submission to the TOB can alternatively be made by telefax. A submission by simple e-mail is no longer permitted in administrative proceedings. This additional requirement will unfortunately make the proceedings more cumbersome and formalized.

### **Voluntary report of the board of directors in the proceedings relating to tender duty**

Under the old rules, the board of the target company was obliged to publish a statement in the proceedings relating to an exemption from the mandatory tender duty or a declaration that a mandatory tender duty does not exist. As of January 1, 2016, this report is no longer mandatory, but can be published voluntarily. The report, if made, has to be published before the TOB issues its ruling in order to avoid that the statement is used to comment on an already issued TOB ruling.

### **Notification obligation in case of exemption from the tender duty after succession, donation, etc.**

The acquisition of voting rights as a result of a donation, succession or partition of an estate, matrimonial property law or foreclosure procedure does – as under the old rules – by law

not trigger an obligation to make an offer. Under the new rules, however, a notification to the TOB has to be made if the acquirer wishes to rely on such exemption. The TOB will commence administrative proceedings within five trading days if it has reason to believe that the conditions of the exemption are not satisfied. This provision has been adopted in the TOO despite criticism in the consultation procedure. Beginning on January 1, 2016, the notification requirement has to be kept in mind in the context of succession planning, divorces, foreclosure or donations. However, the time for making such notification is unclear. Should the disclosure rules be applied by analogy, the notification would have to be made to the TOB within twenty trading days in case of acquisition as a result of succession and within four trading days in all other circumstances.

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

**Legal Note:** The information contained in this UPDATE Newsflash is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.

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