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## Ordinance of the Swiss Federal Banking Commission on Stock Exchanges and Securities Trading

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## Ordinance of the Swiss Federal Banking Commission on Stock Exchanges and Securities Trading

(Stock Exchange Ordinance-SFBC, SESTO-SFBC) of 25 June 1997

#### **Unofficial translation**

The Swiss Federal Banking Commission (Banking Commission), based upon Article 15 para 3, Article 19 para 3, Article 20 para 5 and Article 32 paras 2 and 6 of the Stock Exchange Act of 24 March 1995<sup>1</sup> (SESTA, hereinafter referred to as the Act), decrees:

# Chapter 1: Daily Record and Reporting Requirements for Securities Dealers

## **Section 1: Daily Record Requirements**

#### Art. 1 (Art. 15, SESTA)

- a. identification of securities;
- b. time of receipt of order;
- c. designation of customer;
- d. designation of type of transaction and order;
- e. size of order.

- a. time of execution;
- b. size of execution;
- c. price obtained or allotted;
- d. place of execution;
- e. designation of counterparty;
- f. value date.

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<sup>&</sup>lt;sup>1</sup> The securities dealer shall in principle record in a journal or partial journals (the "journal") all orders received and all trades executed by it on and off exchange, irrespective of whether or not the securities in question are admitted for trading on a stock exchange.

<sup>&</sup>lt;sup>2</sup> For orders received, the following data shall be recorded in the journal:

<sup>&</sup>lt;sup>3</sup> For transactions carried out, the following data shall be recorded in the journal:

<sup>&</sup>lt;sup>1</sup> SR **954.1** 

### **Section 2: Reporting Requirement**

#### Art. 2 Basic principles (Art. 15, SESTA)

### Art. 3 Reporting requirement (Art. 15, SESTA)

<sup>1</sup> The securities dealer shall be obliged to report the following transactions:

- a. all on- and off-exchange transactions conducted in Switzerland in Swiss and foreign securities which are admitted for trading on a Swiss stock exchange;
- b. all on- and off-exchange transactions conducted abroad in Swiss and foreign securities which are admitted for trading on a Swiss stock exchange, with the exception of transactions specified in Art. 4, letters a and b.
- $_{\rm 2}\text{The}$  reporting requirement shall apply to both own-account and customer transactions.

## Art. 4 Exceptions (Art. 15, SESTA)

The securities dealer shall not be obliged to report the following transactions:

- a. transactions abroad in foreign securities admitted for trading on a Swiss stock exchange, provided that they are conducted on a foreign stock exchange recognised by Switzerland;
- b. transactions abroad in securities admitted for trading on a Swiss stock exchange, provided that they are conducted by the branch of a Swiss securities dealer which is authorised to trade by a foreign supervisory authority and is subject to daily record and reporting requirements in the country concerned:
- c. transactions in securities not admitted for trading on a Swiss stock exchange.

## Art. 5 Contents of the report (Art. 15, SESTA)

The report must contain the following information:

- a. designation of the securities dealer subject to the reporting requirement;
- b. designation of type of transaction (purchase/sale);
- c. identification of the securities traded;
- d. size of execution (for bonds in nominal value, for other securities in units or contracts);
- e. price;
- f. time of execution (transaction date and time);
- q. value date;

<sup>&</sup>lt;sup>4</sup> Irrespective of whether they are subject to the reporting requirement pursuant to Section 2, the orders received and the transactions carried out shall in principle be recorded in a standardised form, so that full information can be communicated without delay to the Banking Commission at the latter's request.

<sup>&</sup>lt;sup>5</sup> The Banking Commission shall determine, in particular, the scope of the daily record requirement as well as the form and the content of the journal in a supplementary circular.

<sup>&</sup>lt;sup>1</sup> All on- and off-exchange transactions conducted in Switzerland by securities dealers in securities admitted for trading on a Swiss stock exchange shall in principle be subject to the reporting requirement.

<sup>&</sup>lt;sup>2</sup> Public flotations of securities denominated in Swiss francs on the primary market must be reported to the Swiss National Bank. The Swiss National Bank shall issue its own regulations thereon.

- h. indication whether own-account or customer transaction;
- i. designation of counterparty (stock exchange member, other securities dealer, customer);
- j. stock exchange identification.

### Art. 6 Reporting period (Art. 15, SESTA)

- a. turnover of 100 or more round lots per transaction: daily, by the start of trading on the next business day at the latest;
- b. turnover of less than 100 round lots per transaction: once a week, before the start of trading on the first business day of the following week.

The round lots currently valid at the Swiss Exchange shall apply to transactions pursuant to para. 2.

## Art. 7 Reporting office (Art. 15, SESTA)

- a. for on-exchange transactions conducted by stock exchange members: in accordance with the stock exchange regulations;
- b. for other transactions: to the stock exchange where the security is admitted for trading. If the security is admitted for trading on several stock exchanges, the securities dealer shall inform the Banking Commission of the stock exchange at which he fulfils his reporting obligations.

## **Chapter 2: Audit Report on Securities Dealers**

## **Art. 8** (Art. 19, para. 3, SESTA)

- a. allow a simplified report, particularly if the provisions of banking legislation appear disproportionate or are not applicable;
- b. order a more detailed report, particularly if business activities are restricted to, or focus on, securities trading.

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<sup>&</sup>lt;sup>1</sup> Transactions conducted by stock exchange members shall be reported within the period stipulated by the exchange regulations.

<sup>&</sup>lt;sup>2</sup>Transactions conducted by other securities dealers shall be reported as follows:

<sup>&</sup>lt;sup>1</sup> In principle, the central reporting office for all securities dealers shall be the Swiss Exchange.

<sup>&</sup>lt;sup>2</sup> The central reporting office may request adequate compensation for carrying out the tasks related to receiving and processing the reports on behalf of the Banking Commission. Such compensation shall be subject to the approval of the Banking Commission.

<sup>&</sup>lt;sup>3</sup> Should there be several stock exchanges authorised by the Banking Commission in Switzerland, the reports shall be submitted as follows:

<sup>&</sup>lt;sup>1</sup> The scope of the audit and the contents of the audit report shall in principle be governed by Articles 43-47 of the Ordinance on Banks of 17 May 1972<sup>2</sup>.

<sup>&</sup>lt;sup>2</sup>The audit report must contain the results of the examinations stipulated in Article 19, paragraph 1 of the Act.

<sup>&</sup>lt;sup>3</sup> The Banking Commission may:

<sup>&</sup>lt;sup>4</sup> For securities dealers with bank status, the results of the audit pursuant to paragraph 2 shall be incorporated in the audit report required by banking legislation.

<sup>&</sup>lt;sup>2</sup> SR **952.02** 

### **Chapter 3: Disclosure of Shareholdings**

## Section 1: Obligation to Notify

#### Art. 9 Principle (Art. 20 paras 1 and 5, SESTA)

- acquisition and sale through a third party operating legally under its own name and trading for the account of the financial beneficiary;
- b. acquisition and sale through legal entities controlled directly or indirectly;
- acquisition and sale of a shareholding which directly or indirectly leads to control of a legal entity
  which itself holds equity securities directly or indirectly;
- d. any other proceeding which can result in to the acquisition of the voting rights attached to equity securities, except the granting of a power of attorney exclusively for representation at a general meeting of shareholders.

#### Art. 10 Creation and calculation

(Art. 20 paras 1 and 5, SESTA)

- a. for the acquisition and sale of equity securities, of conversion and share acquisition rights, of financial instruments described in Art. 13 para. 1<sup>ter</sup> as well as for the granting of share sale rights (purchase positions); and
- b. for the acquisition and sale of share sale rights as well as for the granting of conversion and share acquisition rights (sale positions).

## Art. 11 Usufruct (Art. 20 paras 1 and 5, SESTA)

Constitution or conclusion of usufruct shall be considered as equivalent to acquisition or sale of the equity securities with respect to the obligation to notify.

<sup>&</sup>lt;sup>1</sup>The economic beneficiaries of equity securities which are directly or indirectly acquired or sold shall be obliged to notify, provided such acquisition or sale reaches, exceeds or falls below the threshold percentages pursuant to Article 20 para. 1 of the Act (threshold).

<sup>&</sup>lt;sup>2</sup>The obligation to notify shall also apply to those who by the acquisition or sale of equity securities for the account of several economic beneficiaries independent of each other reach, exceed or fall below the threshold percentages and are entitled to exercise voting rights to that extent.

<sup>&</sup>lt;sup>3</sup>The following shall be considered as constituting an indirect acquisition or sale:

<sup>&</sup>lt;sup>4</sup> No notification is required if equity securities temporarily reach, exceed or fall below a threshold in the course of a trading day (intraday).

<sup>&</sup>lt;sup>1</sup> The obligation to notify shall be created with the constitution of a right to acquire or sell equity securities (in particular, by the conclusion of a contract). Announcing an intention to acquire or sell shall not create an obligation to notify, provided it does not entail legal obligations.

<sup>&</sup>lt;sup>2</sup> The percentage thresholds shall be calculated on the basis of the total amount of voting rights according to the entry in the Commercial Register.

<sup>&</sup>lt;sup>3</sup> Anyone reaching, exceeding or falling below a threshold with regard to one or both of the positions described below must calculate the positions individually and independently of each other and submit notification of both at the same time:

# Art. 12 Securities lending and similar transactions (Art. 20 paras 1 and 5, SESTA)

#### Art. 13 Financial instruments

(Art. 20 paras 2, 2<sup>bis</sup> and 5, SESTA)

- a. the acquisition or sale of conversion and share acquisition rights (in particular, call options) and share sale rights (in particular, put options);
- b. the granting (writing) of conversion and share acquisition rights (in particular, call options) and share sale rights (in particular, put options);

<sup>1bis</sup> This obligation to notify applies regardless of whether or not the financial instrument provides for or allows actual delivery.

<sup>1ter</sup> The obligation to notify applies specifically also to transactions in financial instruments pursuant to Art. 20 para. 2<sup>bis</sup> of the Act

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## Art. 14 Other circumstances subject to the obligation to notify (Art. 20 paras 1 and 5, SESTA)

An obligation to notify shall also exist, in particular, if a shareholding reaches, exceeds or falls below a threshold:

- a. as the result of an increase or reduction in or a restructuring of company capital;
- b. in the event of acquisition or sale by a company of its own equity securities;
- c. in the event of the acquisition or sale of equity securities for in-house investment funds pursuant to Art. 4 of the Collective Investment Schemes Act of 23 June 2006 (CISA)<sup>3</sup>; these shall be included in the bank's or securities dealer's own holdings;
- d. owing to the proportion of voting rights of the shares alone (whether exercisable or not), regardless of whether or not the total proportion of voting rights reaches, exceeds or falls below a threshold when financial instruments pursuant to Art. 13 are taken into account.

## Art. 15 Action in concert and organised

**Groups** (Art. 20 paras 1, 3 and 5, SESTA)

- a. a legal relationship for the acquisition or sale of equity securities;
- b. a legal relationship regarding the exercise of voting rights (shareholders' voting agreement); or

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<sup>&</sup>lt;sup>1</sup> Securities lending shall only be subject to the obligation to notify if the borrower can exercise voting rights.

<sup>&</sup>lt;sup>2</sup> Similar transactions, such as the sale of equity securities with a buyback commitment (repo transactions), shall only be subject to the obligation to notify if the acquirer of the equity securities can exercise voting rights.

<sup>&</sup>lt;sup>1</sup> The following shall be subject to the obligation to notify:

<sup>&</sup>lt;sup>2</sup> In addition, financial instruments already notified pursuant to paras. 1 and 1<sup>ter</sup> are subject to a new obligation to notify if the holding reaches, exceeds or falls below a threshold in the event of their exercise or non-exercise.

<sup>&</sup>lt;sup>1</sup> Those who coordinate their conduct with third parties by contract or by any other organised methods with view to the acquisition or sale of equity securities or the exercise of voting rights shall be held to be acting in concert or as an organised group.

<sup>&</sup>lt;sup>2</sup> Such coordination of conduct shall exist, inter alia, in the event of:

<sup>&</sup>lt;sup>3</sup> SR **951.31** 

- the constitution by individuals and/or legal entities of a group of companies or other types of firm controlled through possession of the majority of voting rights or capital or in any other way.
- <sup>3</sup> Those acting in concert or as an organised group shall notify their total holdings, the identity of individual members, the type of arrangement and the identity of their representatives.
- <sup>4</sup> Acquisitions and sales among associates who have notified their total holdings shall be exempt from the obligation to notify.
- <sup>5</sup> However, the obligation to notify shall apply to changes in the identity of the persons involved and in the type of understanding arrangement or group.

#### Art. 16 Collective investment schemes

(Art. 20 paras 1, 3 and 5, SESTA)

<sup>1bis</sup> The following provisions apply to the fulfillment of the obligation to notify:

- a. The licensee of several collective investment schemes shall notify the holdings of all schemes globally as well as of each collective investment scheme which individually reaches, exceeds or falls below thresholds.
- b. Fund management companies within a group of companies are not obliged to consolidate their holdings with those of the group of companies.
- c. In the case of an externally managed SICAV, its notification obligations must be fulfilled by the fund management company.
- d. Each sub fund within an open-ended collective investment scheme with sub funds is deemed to be a separate collective investment scheme as described in para. 1.

#### Art. 16a Banks and securities dealers

(Art. 20 para. 5 SESTA)

- <sup>1</sup> Subject to para. 2, in calculating the proportion of voting rights, banks and securities dealers must not include equity securities which:
  - a. are held in their trading book, providing the associated proportion of voting rights amounts to less than five percent;
  - are held in connection with securities lending, transfer of title for the purpose of collateralisation or similar transactions, providing the associated proportion of voting rights amounts to less than five percent;
  - c. are held exclusively and for a maximum of three trading days for the purposes of clearing or settlement.

<sup>4</sup> S	R	95	1.	.3	•
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<sup>&</sup>lt;sup>1</sup> The notification obligations which apply to holdings of authorised collective investment schemes pursuant to the CISA<sup>4</sup> must be fulfilled by the licensee (Art. 13 para. 2 a – d CISA in addition to Art. 15 in conjunction with Art. 120 para. 1 CISA).

<sup>&</sup>lt;sup>1ter</sup> Foreign collective investment schemes which are not authorised for sale may fulfill their obligation to notify pursuant to paras. 1 and 1<sup>bis</sup> if they in advance provide evidence to the disclosure office that they satisfy, mutatis mutandis, the requirements of Art. 120 CISA.

<sup>&</sup>lt;sup>2</sup> Information on the identity of investors shall not be required.

<sup>&</sup>lt;sup>2</sup> Calculation in accordance with para. 1 is permissible providing there is no intention to exercise the voting rights conferred by these holdings (or to influence the management of the issuer in any other way), and providing the total proportion of voting rights does not exceed ten percent.

#### **Section 2 Notification**

#### Art. 17 Contents of notification

(Art. 20 para. 5, SESTA)

- a. the proportion of voting rights, the type and number of all equity securities or financial instruments pursuant to Art. 13 that are held by those concerned, as well as the voting rights attached to these holdings. Where a holding falls below the 3% threshold, notification may be limited to the fact that the holding has fallen below the threshold and may omit information on the proportion of voting rights;
- a<sup>bis</sup>. facts and circumstances which trigger an obligation to notify, such as acquisition, sale, securities lending and similar transactions pursuant to Art. 12, changes in the company's registered capital, the exercise or non-exercise of financial instruments pursuant to Art. 13, grounds for action in concert or a change to the composition of a group:
- b. the time (date) of the acquisition, sale or arrangement by which the holding reached, exceeded or fell below the threshold:
- the time (date) of transfer of the equity securities, if this was not the same as that of the conclusion of the contract:
- d. the full name, place of residence or company name, registered office and address of the buyer or sellor or the persons involved;
- e. the responsible person to contact;
- f. additional information in the event of action in concert or as an organised group pursuant to Article
   15.

#### Art. 18 Time limits (Art. 20 para. 5, SESTA)

## Art. 19 Publication (Art. 20 para. 5 and Art. 21, SESTA)

<sup>&</sup>lt;sup>1</sup>The notification shall contain the following information:

<sup>&</sup>lt;sup>1bis</sup> In the case of financial instruments pursuant to Art. 13, the notification must also include the security ID number (ISIN) if the instrument is listed on a Swiss stock exchange, or information on basic terms such as, in particular, the identity of the issuer, the underlying, the subscription ratio, the exercise price, the exercise period and the exercise type.

<sup>&</sup>lt;sup>2</sup> In the event of indirect acquisition or indirect sale (Art. 9), the notification shall contain full information about the indirect as well as the direct buyer or sellor. The relationship between the economic beneficiary and the direct buyer or sellor must emerge clearly from the notification.

<sup>&</sup>lt;sup>3</sup> Any change in the information subject to the obligation to notify shall be communicated to the stock exchange and to the company without delay.

<sup>&</sup>lt;sup>1</sup> The notification shall be made in writing to the company and the stock exchanges no later than four trading days after the creation of the obligation to notify.

<sup>&</sup>lt;sup>2</sup>The company must publish the notification no later than two trading days after receiving it.

<sup>&</sup>lt;sup>1</sup> The company must publish notification in accordance with Art. 17 paras. 1 and 1<sup>bis</sup> via the electronic publication platform operated by the competent disclosure office.

<sup>&</sup>lt;sup>1bis</sup> If the disclosure office does not operate an electronic publication platform, the company must publish the notification in accordance with Art. 17 paras. 1 and 1<sup>bis</sup> in the Swiss Official Gazette of Commerce (SOGC) and in at least one of the main electronic media publishing stock market information.

<sup>&</sup>lt;sup>2</sup> Where notification is published in accordance with para. 1<sup>bis</sup>, the time at which notification is transmitted to the electronic media shall be determinant for compliance with time limits pursuant to Art. 18 para. 2. Notification must be sent to the competent disclosure office at the same time.

## Art 20 Exemptions and easier disclosure

(Art. 20 paras 1 and 5 and Art. 21, SESTA)

- <sup>1</sup> Exemptions from or easing of the obligations to notify and to publish may be granted in justified cases, in particular if the transaction in question:
  - a. is of a short-term nature;
  - b. is not linked to an intention to exercise voting rights; or
  - c. is subject to conditions.

## Art. 21 Rulings in advance (Art. 20 para. 6, SESTA)

Applications for a ruling in advance on the existence of an obligation to notify shall be made to the stock exchange in good time, before carrying out the transaction in question. The application shall be substantiated and shall contain all the information pursuant to Article 17.

## Art. 22 Disclosure office and procedure

(Art. 20 paras 5 and 6 and Art. 21, SESTA)

- a. if it wishes to rule on the matter itself;
- b. if the applicant rejects or does not comply with the recommendation; or
- c. if the stock exchange requests a ruling from it.

## Art. 23 Supervision

(Art. 4, Art. 20 paras 4 and 5 and Art. 21, SESTA)

<sup>&</sup>lt;sup>2</sup>No exemption from the obligation to notify may be granted for transactions which have already been concluded.

<sup>&</sup>lt;sup>3</sup> Applications for exemption or easier disclosure shall be made to the stock exchange in good time, before carrying out the transaction in question.

<sup>&</sup>lt;sup>1</sup> Stock exchanges shall set up a special office within their organisation (a disclosure office) for processing applications for exemptions and easier disclosure (Art. 20) and rulings in advance (Art. 21). If the setting-up of such an office is considered unreasonable in a particular case, this function may be transferred to another stock exchange; the rules governing such cooperation shall be submitted to the Banking Commission for approval.

<sup>&</sup>lt;sup>2</sup> The Banking Commission and the Takeover Board shall provide the disclosure office with the information and documents it requires to carry out its duties.

<sup>&</sup>lt;sup>3</sup> The disclosure office shall issue a recommendation to the applicant; this shall be substantiated and also communicated to the Banking Commission.

<sup>&</sup>lt;sup>4</sup>The Banking Commission shall issue an order:

<sup>&</sup>lt;sup>5</sup> If the Banking Commission intends to rule on the matter itself, it shall issue a statement to this effect within a time limit of five trading days.

<sup>&</sup>lt;sup>6</sup> Rejection of a recommendation shall be substantiated by the applicant within a time limit of five trading days by means of a written communication to the disclosure office. The latter may extend this time limit. The files shall be transmitted to the Banking Commission.

<sup>&</sup>lt;sup>7</sup> Stock exchanges may require appropriate remunerations for their work in processing applications on behalf of the Banking Commission. The amount of such remuneration shall require approval by the Banking Commission.

<sup>&</sup>lt;sup>8</sup> If a company neglects to make a publication without having submitted an application for exemption, the stock exchange may take steps to publish the information laid down by the law without delay.

<sup>&</sup>lt;sup>1</sup> Stock exchanges shall regulate the organisation of disclosure, the supervision of the obligations to notify and to publish, as well as the organisation of the disclosure office, in a set of rules.

<sup>&</sup>lt;sup>2</sup>The Banking Commission may direct stock exchanges or legal auditors to carry out investigations.

## **Chapter 4: Obligation to Make an Offer**

**Section: 1: Obligation to Offer** 

### Art. 24 Applicable provisions (Art. 32 para. 6, SESTA)

In addition to Article 32 of the Act and the provisions below, Articles 22 to 31, 33 and 52 to 54 of the Act as well as the implementing provisions of the Federal Council and the Takeover Board on public takeover offers shall be applicable.

## Art. 25 Obligation to offer (Art. 32 paras 1 and 6, SESTA)

Anybody who acquires equity securities directly or indirectly and in so doing exceeds the threshold laid down by the law or in the articles of association pursuant to Article 32 para. 1 of the Act (threshold) shall be obliged to make an offer.

## Art. 26 Indirect acquisition (Art. 32 paras 1 and 6, SESTA)

Article 9 para. 3 above shall apply by analogy to indirect acquisitions of shareholdings in the offeree company subject to the offer obligation.

## Art. 27 Action in concert and organised

**Groups** (Art. 32 paras 1, 3 and 6, SESTA)

Article 15 paras 1 and 2 shall apply by analogy to persons who, with a view to gaining control of the offeree company, act in concert or as an organised group and acquire a shareholding of the offeree company subject to an offer obligation.

### Art. 28 Calculation of the threshold

(Art. 32 paras 1 and 6, SESTA)

## Art. 29 Subject of the obligatory offering

(Art. 32 paras 1 and 6, SESTA)

<sup>&</sup>lt;sup>1</sup>The threshold shall be calculated on the basis of the total voting rights according to the entry in the Commercial Register.

<sup>&</sup>lt;sup>2</sup> The shareholding of the acquirer determinative for exceeding the threshold shall include all the equity securities owned by him or conferring voting rights, regardless of whether such voting rights may be exercisable or not, except the granting of a power of attorney exclusively for representation at a general meeting.

<sup>&</sup>lt;sup>1</sup>The obligatory offering shall cover all classes of listed equity securities of the offeree company.

<sup>&</sup>lt;sup>2</sup> It shall also cover equity securities resulting from conversion or share acquisition rights, if such rights are exercised before the end of the final offer period; it may also cover conversion or share acquisition rights which are not yet exercisable during the offer period.

## Art 30 Transfer of the obligation to offer to the acquirer (Art. 32 paras 3 and 6, SESTA)

If the previous beneficiary of the equity securities was, pursuant to the transitional provision contained in Article 52 of the Act, subject to the obligation to make an offer for all equity securities in the event of exceeding the threshold of 50 per cent of the voting rights, this obligation shall be transferred to the acquirer of a holding accounting for more than 33 1/3 per cent but less than 50 per cent of the voting rights, if the acquirer is exempted from the obligation to offer pursuant to Article 32 para. 3 of the Act.

## Art. 31 Revival of the obligation to offer

(Art. 32 para. 6, SESTA)

Anyone who after the entry into force of the Act reduces a previous shareholding of 50 per cent or more of the voting rights of a company to a proportion below 50 per cent shall be subject to the offer obligation pursuant to Article 32 of the Act if at a later date he again exceeds the threshold of 50 per cent.

## Art. 32 Obligatory offering and conditions

(Art. 32 paras 1, 3 and 6, SESTA)

- 1 On request, the Takeover Board shall give an opinion on whether an obligation to offer exists.
- $_{2}$  Unless important reasons can be demonstrated, the obligatory offering shall be unconditional; such important reasons may be in particular:
  - a. if official authorisation is required for acquisition;
  - b. if the equity securities to be acquired do not confer voting rights; or
  - c. if the offeror wishes that the concretely designated economic substance of the offeree company should not be changed.

## Art. 33 General exemptions

(Art. 32 paras 2, 3 and 6, SESTA)

- a. if the threshold is exceeded within the framework of restructuring resulting from a reduction in capital followed by an immediate increase in order to offset a loss;
- b. if banks or securities dealers, either acting alone or as a syndicate, make a firm underwriting of equity securities within the framework of an issue and undertake to resell, no later than three months after such threshold has been exceeded, the number of equity securities exceeding the percentage threshold, and if the resale in fact takes place within such period. In justified cases, the Banking Commission may extend the time limit on request.

## Art. 34 Special exemptions

(Art. 32 paras 2 and 6, SESTA)

 a. if the acquirer cannot control the offeree company because another individual or group possesses a higher proportion of voting rights;

<sup>&</sup>lt;sup>1</sup>The offer obligation shall not be applicable:

<sup>&</sup>lt;sup>2</sup> Claims for an exemption under paragraph 1 above shall be notified to the Banking Commission and the Takeover Board. They may raise objections within five trading days if the conditions of paragraph 1 above are not fulfilled.

<sup>&</sup>lt;sup>3</sup> Notification of a claim for exemption pursuant to Article 32 para. 3 of the Act shall not be required.

<sup>&</sup>lt;sup>1</sup> In the cases described in Article 32 para. 2 of the Act, as well as in other justified cases, an acquirer subject to the obligation to offer may be exempted from the obligation to make an offer for important reasons.

<sup>&</sup>lt;sup>2</sup> Other justified cases pursuant to Article 32 para. 2 of the Act may exist, in particular the following:

- b. if a member of an organised group pursuant to Article 32 para. 2. letter a of the Act exceeds the threshold in his own right; or
- c. if a previous acquisition has taken place indirectly pursuant to Article 26 in combination with Article 9 para. 3 letter c this acquisition is not one of the main purposes of the transaction and the interests of shareholders of the offeree company are safeguarded.
- <sup>3</sup> Conditions may be attached to the granting of exemptions; in particular, obligations for the future may be imposed on the acquirer. These conditions shall be transferred to a legal successor which acquires a shareholding of more than 33 1/3 per cent if it was exempted from the obligation to offer pursuant to Article 32 para. 3 of the Act.

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#### Art. 35 Procedure (Art. 32 paras 2 and 6, SESTA)

- <sup>1</sup> Applications for an statement of position on the existence of an obligation to offer or for the admission of conditions as well as for particular exemptions shall be addressed to the Takeover Board.
- <sup>2</sup> The Takeover Board shall invite the target company to state its position, and shall issue a substantiated recommendation. The recommendation shall be provided to the applicant, the parties concerned and the Swiss Federal Banking Commission.
- <sup>2bis</sup> Should the Takeover Board determine that no duty to make an offer exists or that a particular exemption is to be granted, it will be tied to the condition that the target company publish its response, which must also contain the precise wording of Art. 35 para. 2<sup>quater</sup>. Art. 29 para. 1 of the Act shall apply analogously.
- <sup>2ter</sup> The statement by the Takeover Board that no duty to make an offer exists or that a particular exemption should be granted shall be published in the Swiss Official Gazette of Commerce (SOGC).

<sup>2quater</sup> The participants in the target company may demand within ten trading days that the Banking Commission issue a challengeable order. Appeals may be lodged against this ruling. The ten-day period begins on the first trading day after publication in the SOGC.

<sup>3</sup>The Banking Commission shall issue an order:

- a. if it wishes to rule on the matter itself;
- b. if the applicant rejects or does not comply with the recommendation: or
- c. if the Takeover Board requests it to rule on the matter.
- <sup>4</sup> Should the Banking Commission wish to rule on the matter itself, it must declare its intention to do so:
  - a. within ten trading days after publication in the SOGC in the case of a recommendation concerning a particular exemption or a statement on the existence of an obligation to offer;
  - b. within five trading days in all other cases.
- <sup>5</sup> Rejection of a recommendation shall be substantiated by the applicant within a time limit of five trading days by means of a written communication to the Takeover Board. The latter may extend this time limit. The files shall be forwarded to the Banking Commission.

#### Art. 36 Time limit (Art. 32 paras 1 and 6, SESTA)

<sup>&</sup>lt;sup>6</sup> The Takeover Board may demand appropriate compensation for its work in processing applications.

<sup>&</sup>lt;sup>1</sup> The obligatory offering shall be made no later than two months after the threshold has been exceeded.

<sup>&</sup>lt;sup>2</sup> The Takeover Board may grant an extension of this time limit for important reasons.

#### Section 2: Determination of the Offer Price

## Art. 37 Stock exchange price

(Art. 32 paras 4, 5, and 6, SESTA)

## Art. 38 Price of prior acquisition

(Art. 32 paras 4, 5 and 6, SESTA)

## Art. 39 Settlement of the offer price

(Art. 32 paras 4, 5 and 6, SESTA)

## Art. 40 Prior acquisition by exchange of equity securities (Art. 32 paras 4, 5 and 6, SESTA)

<sup>&</sup>lt;sup>1</sup> The price of the offer shall be at least as high as the stock exchange price for each class of equity security of the offeree company.

<sup>&</sup>lt;sup>2</sup> The stock exchange price pursuant to Article 32 para. 4 SESTA shall correspond to the volume-weighted average price of all on-exchange transactions executed during the sixty trading days prior to publication of the offer or, as it were, the advance announcement.

<sup>&</sup>lt;sup>3</sup> The stock exchange price shall be adjusted to take into account any sizable fluctuations due to special events during this period, such as dividend payments or capital transactions. An auditor (Art. 25 SESTA) must confirm in its report that the adjustment is reasonable as well as indicate the related basis of calculation.

<sup>&</sup>lt;sup>4</sup> If, prior to publication of the offer or, as it were, the advance announcement, the listed equity securities are illiquid, the stock exchange price shall be based on the valuation established by an auditor (Art. 25 SESTA). In its report, said auditor must indicate the valuation method as well as the underlying criteria for such valuation.

<sup>&</sup>lt;sup>1</sup> The price of prior acquisition shall correspond to the highest price the acquirer has paid for the equity securities of the offeree company in the course of the twelve months prior to publication of the offer or, as it were, the advance announcement.

<sup>&</sup>lt;sup>2</sup> This price shall be calculated separately for each class of equity security. Determination of an appropriate relationship between the prices of several classes of equity security pursuant to Article 32 para. 5 of the Act shall be based on the highest price paid for an equity security in comparison with its par value.

<sup>&</sup>lt;sup>3</sup> If, in addition to cash payments, other substantial benefits provided by the acquirer and/or the seller, such as guarantees or non-cash benefits, are included in the price of the prior acquisition, the minimum price may be increased and/or reduced by the amount corresponding to such benefits.

<sup>&</sup>lt;sup>4</sup> In its report, an auditor (Art. 25 SESTA) shall confirm the reasonableness of the increase/reduction under para. 3, above, and reveal its calculations.

<sup>&</sup>lt;sup>1</sup> The offer price may be settled by cash payment or in the form of an exchange of equity securities.

<sup>&</sup>lt;sup>2</sup> An exchange of equity securities shall also be possible if a prior acquisition was made in cash.

<sup>&</sup>lt;sup>1</sup> If prior acquisition of equity securities took the form of an exchange, the offeror may not offer the same exchange with a reduction in the exchange ratio of more than 25 per cent, even if the value of the equity securities in question of the offeree company has fallen in the meantime. However, the value of the equity securities offered in exchange must not be lower than the stock exchange price of the equity securities in question at the time of publication of the offer.

<sup>&</sup>lt;sup>2</sup> If an offer is settled by cash payment, the equity securities of the offeree company previously acquired in the form of an exchange shall be taken into account at their value at the time of the exchange; this valuation shall be checked by a review body, together with the offer.

## Art. 41 Indirect prior acquisition

(Art. 32 paras 4, 5 and 6, SESTA)

If the prior acquisition was carried out indirectly pursuant to Article 26 in combination with Article 9 para. 3 letter c, the offeror shall disclose in the offer prospectus the proportion of the price paid which corresponds to the equity securities of the offeree company; the valuation of this proportion shall be checked by a review body.

## Art. 42 Valuation of the equity securities

(Art. 32 paras 4, 5 and 6, SESTA)

## Art. 43 Exemptions (Art. 32 paras 4, 5 and 6, SESTA)

After consultation with the Banking Commission, the Takeover Board may grant exemptions from the rules contained in this section (Arts 37 to 42) to an offeror in individual cases for important reasons.

## **Chapter 5: Final Provisions**

## Art. 44 Repeal of existing law

The Stock Exchange Ordinance-SFBC of 21 October 1996<sup>5</sup> shall be repealed.

## Art. 45 Disclosure of shareholdings

(Art 51, SESTA)

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<sup>&</sup>lt;sup>1</sup> Article 37 para. 2 shall apply by analogy to the calculation of the stock exchange price of equity securities offered in exchange; the valuation shall be checked by a review body.

<sup>&</sup>lt;sup>2</sup> Any non-listed equity securities or listed equity securities with a non-liquid market which are offered in exchange or were exchanged in a prior acquisition shall be valued by a review body.

<sup>&</sup>lt;sup>1</sup> The transitional provision contained in Article 51 of the Act shall apply to all those who, at the time of the entry into force of the Act, directly, indirectly, acting in concert or as an organised group possess a shareholding of at least five per cent of the voting rights in a company whose equity securities are, in whole or in part, listed in Switzerland.

<sup>&</sup>lt;sup>2</sup> The sale of equity securities acquired before the entry into force of the Act shall not be subject to the obligation to notify during the transitional period pursuant to Article 51 of the Act, even if as a result the seller reaches or falls below the threshold pursuant to Article 20 of the Act.

<sup>&</sup>lt;sup>3</sup> However, any acquisition of equity securities which takes place after the entry into force of the Act and which results in a threshold pursuant to Article 20 of the Act being reached or exceeded shall be subject to an immediate obligation to notify; for their sale at a later date, the transitional rule pursuant to para. 2 above in combination with Article 51 of the Act shall no longer apply.

<sup>&</sup>lt;sup>4</sup> Changes in the identity of those acting in concert or as an organised group during the transitional period shall not be subject to the obligation to notify, unless the type of arrangement or group undergoes substantial change as well.

<sup>&</sup>lt;sup>5</sup> AS **1997** 108

# Art. 46 Contents of notification pursuant to Article 51 of the Act (Art 51, SESTA)

Notification pursuant to Article 51 of the Act shall contain all information pursuant to Article 17, except the date of acquisition if such acquisition took place before the entry into force of the Act.

## Art. 46a Transitional provisions as of 1 December 2007 (Art. 20 para. 5, SESTA)

The deadline for implementing the amended notification obligations is 29 February 2008.

## Art. 47 Entry into force

This Ordinance shall enter into force on 1 January 1998.