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Ordinance of the Swiss Financial Market  
Supervisory Authority on Stock Exchanges  
and Securities Trading  
(Stock Exchange Ordinance-FINMA, SESTO-  
FINMA)

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Unrestricted

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# Ordinance of the Swiss Financial Market Supervisory Authority on Stock Exchanges and Securities Trading

(Stock Exchange Ordinance-FINMA, SESTO-FINMA)  
of 25 October 2008 (version 1 June 2012)

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## Unofficial translation

The Swiss Financial Market Supervisory Authority (FINMA),  
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 and Securities Trading 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

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### Section 1: Daily record requirements

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

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<sup>1</sup> The securities dealer must, 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>2</sup> For orders received, the following data must be recorded in the journal:

- 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.

<sup>3</sup> For transactions carried out, the following data must be recorded in the journal:

- a. Time of execution
- b. Size of execution
- c. Price obtained or allotted
- d. Place of execution
- e. Name of counterparty
- f. Value date.

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<sup>1</sup> SR 954.1

<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 must, in principle, be recorded in a standardised form, so that full information can be communicated without delay to FINMA at the latter's request.

<sup>5</sup> FINMA will 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.

## Section 2: Reporting requirements

### Art. 2 Principles (Art. 15, SESTA)

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<sup>1</sup> In principle, securities dealers must report all on and off-exchange transactions in securities that are admitted to trading on a Swiss stock exchange.

<sup>2</sup> They must report the following transactions, in particular:

- a. All on and off-exchange transactions conducted in Switzerland in Swiss and foreign securities which are admitted to trading on a Swiss stock exchange
- b. All on and off-exchange transactions conducted abroad in Swiss and foreign securities which are admitted to trading on a Swiss stock exchange, with the exception of transactions specified in Art. 3 a and b.

<sup>3</sup> The reporting requirements apply to both own-account and customer transactions.

### Art. 3 Exemptions (Art. 15, SESTA)

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The securities dealer is not 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 that 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. 4 Content of the report (Art. 15, SESTA)

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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)
- g. Value date
- h. Indication whether own-account or customer transaction
- i. Designation of counterparty (stock exchange member, other securities dealer, customer)
- j. Stock exchange identification.

### Art. 5 Reporting period (Art. 15, SESTA)

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Transactions must be reported within the period stipulated by the exchange regulations.

## **Art. 6 Recipient of report (Art. 15, SESTA)**

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<sup>1</sup> In principle, trades are to be reported to that stock exchange on which the securities are admitted to trading.

<sup>2</sup> If a security is admitted to trading on several FINMA-licensed stock exchanges in Switzerland, in the case of off-exchange transactions the securities dealers concerned may choose the exchange through which they fulfil their obligation to notify.

<sup>3</sup> Stock exchanges must set up a special office within their organisation (reporting office) to receive and process reports.

<sup>4</sup> The reporting office must issue regulations. It may request adequate compensation for the tasks that it performs on behalf of FINMA. Tariffs must be submitted to FINMA for approval.

## **Chapter 2: Correspondence and calculation of time limits**

### **Art. 7 Correspondence (Art. 20, para. 5, SESTA)**

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<sup>1</sup> Reports, as well as applications and petitions in proceedings concerning the disclosure of shareholdings and concerning takeovers, that are submitted by fax or electronically, are permissible in correspondence with FINMA, the Takeover Board and Disclosure Offices, and are recognised for the purposes of compliance with time limits. The original document must follow no later than the next working day.

<sup>2</sup> Decisions and recommendations in such proceedings will generally be served to the parties concerned, to the applicants and to FINMA, by fax or electronically.

### **Art. 8 Calculation of time limits**

**(Art. 20, para. 5, SESTA)**

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<sup>1</sup> If a time limit is calculated in terms of trading days, it will begin on the first trading day following the event that triggered the time limit.

<sup>2</sup> If a time limit is calculated in terms of weeks, in its final week it will end on the same weekday on which the triggering event occurred. If this day is not a trading day, then the time limit ends on the next trading day.

<sup>3</sup> If a time limit is calculated in terms of months, in its final month it will end on the same date on which the triggering event occurred. If there is no such date within the final month, the time limit ends on the last day of the final month. If the day in question is not a trading day, then the time limit ends on the next trading day.

<sup>4</sup> Trading days are days on which the stock exchange in question is available for on-exchange trading, in accordance with its trading calendar.

## Chapter 3: Disclosure of shareholdings

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### Section 1: Obligation to notify

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

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<sup>1</sup> The beneficial owners of equity securities which are directly or indirectly acquired or sold are 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>2</sup> The obligation to notify also applies to those who, by the acquisition or sale of equity securities for the account of several beneficial owners independent of each other, reach, exceed or fall below the threshold percentages and are entitled to exercise voting rights to that extent.

<sup>3</sup> The following are considered as constituting an indirect acquisition or sale:

- a. Acquisition and sale through a third party operating legally under its own name and trading for the account of the beneficial owner
- b. Acquisition and sale through legal entities controlled directly or indirectly
- c. 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 may result in the acquisition of the voting rights attached to equity securities, except the granting of a power of attorney exclusively for representation at a single general meeting of shareholders.

<sup>4</sup> No obligation to notify arises if:

- a. Reaching a threshold has been reported and this threshold is exceeded without reaching or exceeding the next higher threshold;
- b. Reaching or exceeding a threshold has been reported and this threshold is reached again without having reached or exceeded the next higher threshold;
- c. Holdings of equity securities temporarily reach, exceed or fall below a threshold in the course of a trading day (intraday).

#### Art. 10 Action in concert or as an organised group (Art. 20 paras 1, 3 and 5, SESTA)

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<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 are held to be acting in concert or as an organised group.

<sup>2</sup> Such coordination of conduct exists, inter alia, in the event of:

- a. Legal relationships for the acquisition or sale of equity securities
- b. Legal relationships regarding the exercise of voting rights (shareholders' voting agreement), or
- c. The constitution by individuals and/or legal entities of a group of companies or other type 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 must notify their total holdings, the identity of the individual members, the type of arrangement and the identity of their representative.

<sup>4</sup> Acquisitions and sales among associates who have notified their total holdings are exempt from the obligation to notify.

<sup>5</sup> However, the obligation to notify does apply in the case of changes in the composition of those involved and in the nature of the agreement or the group.

## **Art. 11 Creation of obligation to notify**

(Art. 20 paras 1 and 5, SESTA)

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<sup>1</sup> The obligation to notify is created with the constitution of a right to acquire or sell equity securities (act which creates an obligation). The announcement of an intention to acquire or sell does not create an obligation to notify, provided it does not entail legal obligations.

<sup>2</sup> If an increase, reduction or restructuring of share capital results in holdings reaching, exceeding or falling below a threshold, an obligation to notify is created at the time of the corresponding publication in the Swiss Official Gazette of Commerce.

## **Art. 12 Calculation of thresholds**

(Art. 20 paras 1 and 5, SESTA)

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<sup>1</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:

- a. Purchase positions:
  1. Shares and participations with similar properties to shares
  2. Conversion and share purchase rights (Art. 15 para. 1a)
  3. Granted (written) share sale rights (Art. 15 para. 1b)
  4. Financial instruments that economically enable an acquisition (Art. 15 para. 1c)
  5. Financial instruments in respect of a public takeover offer (Art. 15 para. 2)
- b. Sale positions:
  1. Share sale rights (Art. 15 para. 1 a)
  2. Granted (written) conversion and share purchase rights (Art. 15 para. 1b)
  3. Financial instruments that economically enable a sale (Art. 15 para. 1c)

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

## **Art. 13 Usufruct** (Art. 20 paras 1 and 5, SESTA)

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Constitution or termination of usufruct is considered as equivalent to acquisition or sale of the equity securities with respect to the obligation to notify.

## **Art. 14 Securities lending and comparable transactions**

(Art. 20 paras 1 and 5, SESTA)

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<sup>1</sup> Securities lending and comparable transactions such as, specifically, the sale of securities with repurchase obligation (repo transactions) or the transfer of title as collateral must be reported.

<sup>2</sup> The obligation to notify applies only to that contracting party that assumes the securities temporarily in the context of such transactions, i.e.

- a. In the case of lending transactions: the borrower
- b. In the case of repo transactions: the acquirer, and
- c. In the case of transfers of title as collateral: the secured party.

<sup>3</sup> When the transaction expires, the returning contracting party under para. 2 becomes subject to a further obligation to notify if its holdings reach or fall below a threshold.

<sup>4</sup> Securities lending and transactions with repurchase obligations need not be reported, provided they are processed through standardised trading platforms for the purposes of liquidity management.

## **Art. 15 Financial instruments**

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

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<sup>1</sup> The following must be reported:

- a. The acquisition or sale of conversion and share purchase rights (especially call options), as well as share sale rights (especially put options) that provide for or allow actual delivery
- b. The granting (writing) of conversion and share purchase rights (especially call options), as well as share sale rights (especially put options) that provide for or allow actual delivery, and
- c. Financial instruments that provide for or allow cash settlement, as well as other differential transactions (such as contracts for difference and financial futures).

<sup>2</sup> Financial instruments other than those mentioned in para. 1 must also be reported if their structure permits an entitled person to acquire equity securities, if these are acquired, sold or granted (written) in respect to a public takeover offer. This will be presumed if the rights or future interests arising from such financial instruments exceed 15 percent of voting rights when counted together with the other purchase positions, as described in Art. 12 para.<sup>o</sup>1 a.

<sup>3</sup> The exercise or non-exercise of the financial instruments that are to be reported under paras. 1 and 2 must be reported again if holdings reach, exceed or fall below a thresholds as a result.

## **Art. 16 Other circumstances that must be reported**

(Art. 20 paras 1 and 5, SESTA)

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An obligation to notify also exists, in particular, if:

- a. A shareholding reaches, exceeds or falls below a threshold:
  1. As the result of an increase or reduction in or a restructuring of company capital
  2. In the event of acquisition or sale by a company of its own equity securities
  3. 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<sup>2</sup> (CISA); these must be included in the bank's or securities dealer's own holdings;
  4. 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. 15 are taken into account.
  5. If equity securities are transferred ipso jure or due to a decision by a court or public authority;
- b. Changes occur in the relationship between the person acquiring the securities directly, the person acquiring them indirectly, and the beneficial owner.

## **Art. 17 Collective investment schemes**

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

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<sup>1</sup> The notification obligations which apply to holdings in authorised collective investment schemes pursuant to the CISA<sup>3</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>2</sup> The following provisions apply to the fulfilment of the obligation to notify:

- a. The licensee of several collective investment schemes must 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 investment company with variable capital (SICAV), notification obligations must be fulfilled by the fund management company

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<sup>2</sup> SR 951.31

<sup>3</sup> SR 951.31

- d. Each subfund within an open-ended collective investment scheme with subfunds is deemed to be a separate collective investment scheme as described in para. 1.

<sup>3</sup> For foreign collective investment schemes which are not authorized for sale, the fund management company or the investment company may fulfill its obligation to notify pursuant to paras. 1 and 2 if they are not dependent from a group of companies. The fund management company or the investment company is deemed to be independent if it can exercise the voting rights for the equity securities it manages at its own discretion. The prerequisites for this are in particular as follows:

- a. *Personal independence*: The persons of the fund management company or the investment company entrusted with the exercise of the voting rights act independently of the parent entity of the group and of companies controlled by it.
- b. *Organizational independence*: Through its organizational structures, the group ensures that:
1. The parent entity of the group and other companies controlled by it do not influence the exercise of voting rights by the fund management company or the investment company through the issue of instructions or in any other way, and
  2. There is no exchange or dissemination of information between the fund management company or the investment company and the parent entity of the group or other companies controlled by it that could influence the exercise of the voting rights.

<sup>3bis</sup> In the cases set out in para. 3, the group of companies must submit the following documents to the competent Disclosure Office:

- a. a list of the names of the fund management companies or the investment companies; changes to the list must be supplied;
- b. a declaration confirming that it meets and will continue to meet the independence requirements as stipulated in para. 3.

<sup>3ter</sup> In the cases set out in para. 3, the competent Disclosure Office may at any time require submission of further evidence of the fulfillment and continued fulfillment of the independence requirements.

<sup>4</sup> Information on the identity of investors is not required.

## **Art. 18 Banks and securities dealers**

(Art. 20 para. 5 SESTA)

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<sup>1</sup> Subject to para. 2, in calculating the purchase positions (Art. 12 para. 1 a) and the sale positions (Art. 12 para. 1 b), banks and securities dealers must not include equity securities and financial instruments which they:

- a. Hold in their trading book, provided the associated proportion of voting rights amounts to less than five percent
- b. Hold in connection with securities lending, the transfer of title for the purpose of collateralisation or repo transactions, providing the associated proportion of voting rights amounts to less than five percent
- c. Hold exclusively and for a maximum of three trading days for the purposes of clearing or settlement.

<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.

<sup>3</sup> Positions as described in para. 1 must always be taken into account when calculating the proportion of voting rights according to Art. 15 para. 2.

## **Art. 19 Takeover proceedings**

(Art. 20, para. 5, SESTA)

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<sup>1</sup> During a takeover proceeding (Art. 31 SESTA; Art. 38 TOO) the offeror and the parties acting in concert or as an organised group with it are subject exclusively to the obligations to notify laid down in the eighth chapter of the Takeover Ordinance of 21 August 2008<sup>4</sup> (TOO).

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<sup>4</sup> SR 954.195.1; AS 2008 5277

<sup>2</sup> Persons subject to the obligation to notify, as described in para. 1, must submit a new report of their positions to the competent Disclosure Office, in accordance with the provisions of this ordinance, once the takeover proceeding has been completed.

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

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<sup>1</sup> Applications for a ruling in advance on the existence of an obligation to notify must be made to the competent Disclosure Office in good time, before the transaction in question is carried out.

<sup>2</sup> In exceptional circumstances, the competent Disclosure Office may admit applications in respect of transactions that have already been concluded.

## **Section 2: Notification and publication**

### **Art. 21 Content of notification**

(Art. 20 para. 5, SESTA)

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<sup>1</sup> The notification must contain the following information:

- a. The proportion of voting rights, the type and number of all equity securities or financial instruments pursuant to Art.15 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
- b. Facts and circumstances which trigger an obligation to notify, such as acquisition, sale, securities lending and similar transactions pursuant to Art. 14, exercise or non-exercise of financial instruments pursuant to Art. 15, changes in the company's registered capital, decisions by a court or public authority, grounds for action in concert or a change to the composition of a group
- c. The time (date) of the acquisition, sale or arrangement by which the holding reached, exceeded or fell below the threshold
- d. The time (date) of transfer of the equity securities, if this was not the same as that of the conclusion of the contract
- e. The full name, place of residence or company name, registered office and address of the buyer or seller or the persons involved
- f. The contact person responsible.

<sup>2</sup> The following details must be added to the information given under para. 1 in the following cases:

- a. In the case of action in concert or as an organised group pursuant to Art. 10: the information set out in Art. 10 paras. 3 and 5
- b. In the case of legal transactions pursuant to Art. 14:
  1. Proportion of voting rights, type and number of the equity securities or financial instruments pursuant to Art. 15 that have been transferred, and the voting rights associated with them
  2. The nature of the legal transaction
  3. The agreed date of return transfer or, if a right to choose has been granted in this respect, whether this applies to the contracting party that is subject to the obligation to notify under Art. 14 para. 2, or to the counterparty
- c. In the case of financial instruments pursuant to Art. 15 that are admitted to trading on a Swiss stock exchange: the international security identification number (ISIN)
- d. In the case of financial instruments pursuant to Art. 15 that are not admitted to trading on a Swiss stock exchange: the basic terms of the instrument, such as:
  1. The identity of the issuer
  2. The underlying
  3. The subscription ratio
  4. The exercise price
  5. The exercise period
  6. The exercise type

- e. In the case of financial instruments pursuant to Art. 15 para 2: information on the application of this provision
- f. In the case of collective investment schemes pursuant to Art. 17 para 3: information that the requirements set out in Art. 17 para. 3<sup>bis</sup> have been fulfilled.

<sup>3</sup> In the event of indirect acquisition or indirect sale (Art. 9), the notification must contain full information about the direct as well as the indirect buyer or seller. The relationship between the beneficial owner and the direct buyer or seller must be clear from the notification.

<sup>4</sup> Any change in the information subject to the obligation to notify must be communicated to the competent Disclosure Office and to the company within four trading days of the obligation to notify having been created.

## **Art. 22 Time limits (Art. 20 para. 5, SESTA)**

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<sup>1</sup> Notification must be received by the company and the competent Disclosure Office in writing within four trading days of the obligation to notify having been created.

<sup>2</sup> The company must publish the notification within two trading days of receiving the notification.

<sup>3</sup> In the case of transactions in its own securities, the company must both report to the competent Disclosure Office, as per para. 1, and publish the notification as per para. 2 and Art. 23, within four trading days of the obligation to notify having been created.

## **Art. 23 Publication (Art. 20 para. 5 and Art. 21, SESTA)**

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<sup>1</sup> The company must publish the notification in accordance with Art. 21 via the electronic publication platform operated by the competent Disclosure Office. It must ensure that reference is made to the previous notification by the same party.

<sup>2</sup> If the Disclosure Office does not operate an electronic publication platform, the company must publish the notification in the Swiss Official Gazette of Commerce (SOGC) and in at least one of the main electronic media publishing stock market information.

<sup>3</sup> Where the notification is published in accordance with para. 2, the time at which the notification is transmitted to the electronic media determines compliance with time limits pursuant to Art. 22 para. 2. The notification must be sent to the competent Disclosure Office at the same time.

<sup>4</sup> If a company fails to publish notification, or if it publishes an incorrect or incomplete notification, the Disclosure Offices may immediately publish the required information and charge the costs incurred in this substitute measure on to the company. The Disclosure Offices may publish the reason for the substitute measure. The company must be informed in advance.

## **Art 24 Exemptions and easier disclosure (Art. 20 para. 5 and Art. 21, SESTA)**

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<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 transactions in question:

- a. Are of a short-term nature
- b. Are not linked to an intention to exercise voting rights, or
- c. Are subject to conditions.

<sup>2</sup> Applications for exemption or easier disclosure must be made to the competent Disclosure Office in good time, before the transaction in question is carried out.

<sup>3</sup> The competent Disclosure Office will admit applications in respect of transactions that have already been concluded only in exceptional circumstances and where there are extraordinary grounds for doing so.

## Section 3: Surveillance

### Art. 25 Disclosure Office

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

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<sup>1</sup> Stock exchanges must set up a special office within their organisation (a Disclosure Office) for the supervision of the obligations to notify and to publish. This office also processes applications for rulings in advance (Art. 20) and for exemptions and easier disclosure (Art. 24).

<sup>2</sup> 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 must be submitted to FINMA for approval.

<sup>3</sup> The Disclosure Offices provide information on their practices to the public on an ongoing basis. They may issue notices and regulations, and publish in a suitable form information that is required to fulfil the objective of the law. In principle, recommendations must be published in anonymized form.

<sup>4</sup> The Disclosure Offices may request adequate compensation for the tasks that they perform on behalf of FINMA and for processing applications. Tariffs must be submitted to FINMA for approval.

### Art. 26 Procedure

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

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<sup>1</sup> Applications for a ruling in advance (Art. 20) and for exemptions and easier disclosure (Art. 24) must contain a presentation of the facts, an application, and reasons. The presentation of the facts must be documented appropriately and must contain all of the information required under Art. 21.

<sup>2</sup> The Disclosure Office issues recommendations to the applicants; these must be substantiated and also communicated to FINMA.

<sup>3</sup> The Disclosure Office may submit its recommendations to the company. However, important interests of the applicant, specifically business secrets, remain reserved.

<sup>4</sup> FINMA will 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 Disclosure Office requests a ruling from it.

<sup>5</sup> If FINMA intends to rule on the matter itself, it must issue a statement to this effect within a time limit of five trading days.

<sup>6</sup> Rejection of a recommendation must be substantiated by the applicant within a time limit of five trading days by means of a written communication to FINMA. On request, FINMA may extend the time limit for substantiation.

<sup>7</sup> In the cases set out in para. 4, FINMA shall immediately instigate a procedure and notify the Disclosure Office and the parties thereof. At the same time, it shall require the Disclosure Office to submit its files.

### Art. 27 Investigations

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

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FINMA may instruct the Disclosure Offices or the auditors under stock exchange law to conduct investigations.

## **Chapter 4: Obligation to make an offer**

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### **Section: 1: Obligation to offer**

#### **Art. 28 Applicable provisions** (Art. 32 para. 6, SESTA)

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

#### **Art. 29 Principle** (Art. 32 paras 1 and 6, SESTA)

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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 SESTA (threshold) is obliged to make an offer.

#### **Art. 30 Indirect acquisition** (Art. 32 paras 1 and 6, SESTA)

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

#### **Art. 31 Action in concert or as organised groups** (Art. 32 paras 1, 3 and 6, SESTA)

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Article 10 paras 1 and 2 apply by analogy to acquirers 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. 32 Calculation of the threshold** (Art. 32 paras 1 and 6, SESTA)

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<sup>1</sup> The threshold is calculated on the basis of the total voting rights according to the entry in the Commercial Register.

<sup>2</sup> All of the equity securities that are in the possession of the acquirer or that otherwise confer voting rights upon them must be taken into account in determining whether or not a threshold has been exceeded. Whether or not the voting rights can be exercised is irrelevant in this context.

<sup>3</sup> Voting rights that may be exercised only under a power of attorney to represent a shareholder at an annual general meeting are excluded from this calculation.

#### **Art. 33 Subject of the obligatory offer** (Art. 32 paras 1 and 6, SESTA)

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<sup>1</sup> The obligatory offer encompasses all classes of listed equity securities of the offeree company.

<sup>2</sup> It must also encompass equity securities that are newly created by means of financial instruments, if the associated rights are exercised before the final offer period expires, in the sense of Art. 27, para. 2 SESTA.

## **Art 34 Transfer of the obligation to offer to the acquirer (Art. 32 paras 3 and 6, SESTA)**

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If the previous beneficial owner of the equity securities was subject, under the transitional provision laid down in Art. 52 SESTA, to an obligation to make an offer for all equity securities should it exceed the threshold of 50 percent of voting rights, then this obligation is transferred to the acquirer of a holding of between 33⅓ and 50 percent of voting rights, if this party is exempt from the duty to make an offer under Art. 32 para. 3 SESTA.

## **Art. 35 Revival of the obligation to offer (Art. 32 para. 6, SESTA)**

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

## **Art. 36 Obligatory offer and conditions (Art. 32 paras 1, 3 and 6, SESTA)**

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<sup>1</sup> Unless important reasons can be demonstrated, the obligatory offer must be unconditional.

<sup>2</sup> 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 specifically designated economic substance of the offeree company should not be changed.

## **Art. 37 Time limit (Art. 32 paras 1 and 6, SESTA)**

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<sup>1</sup> The obligatory offer must be made no later than two months after the threshold has been exceeded.

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

## **Section 2: Exemptions from the obligation to offer**

### **Art. 38 General exemptions (Art. 32 paras 2, 3 and 6, SESTA)**

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<sup>1</sup> The offer obligation is not applicable:

- 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 Takeover Board may extend the time limit on request.

<sup>2</sup> Claims for an exemption under paragraph 1 above must be submitted to the Takeover Board. The latter will commence administrative proceedings within five days if it has reason to believe that the conditions of para. 1 are not met.

<sup>3</sup> Notification of a claim for exemption pursuant to Article 32 para. 3 SESTA is not required.

## **Art. 39 Special exemptions**

(Art. 32 paras 2 and 6, SESTA)

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

<sup>2</sup> Other justified cases pursuant to Article 32 para. 2 SESTA may exist, in particular the following:

- a. If the acquirer cannot control the offeree company because another individual or group possesses a higher proportion of voting rights
- b. If a member of an organised group pursuant to Article 32 para. 2a SESTA exceeds the threshold in its own right, or
- c. If a previous acquisition has taken place indirectly (Art. 30), 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.

<sup>4</sup> The conditions pursuant to para. 3 are transferred to any legal successor which acquires a shareholding of more than 33 1/3 per cent, even if it the successor is exempt from the obligation to offer pursuant to Article 32 para. 3 SESTA.

## **Section 3: Determination of the offer price**

### **Art. 40 Stock exchange price**

(Art. 32 paras 4 to 6, SESTA)

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

<sup>2</sup> The stock exchange price pursuant to Article 32 para. 4 SESTA corresponds to the volume-weighted average price of all on-exchange transactions executed during the sixty trading days prior to publication of the offer or the advance announcement, as the case may be.

<sup>3</sup> The stock exchange price must be adjusted to take into account any sizable fluctuations owing to special events such as dividend payments or capital transactions during this period. 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>4</sup> If, prior to publication of the offer or the advance announcement, the listed equity securities are illiquid, the stock exchange price must be based on the valuation established by an auditor (Art. 25 SESTA). In their report, the said auditor must indicate the valuation method as well as the underlying criteria for such valuation.

### **Art. 41 Price of prior acquisition**

(Art. 32 paras 4 to 6, SESTA)

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<sup>1</sup> The price of prior acquisition corresponds to the highest price paid by the acquirer for the equity securities of the offeree company in the course of the twelve months prior to publication of the offer or announcement.

<sup>2</sup> This price is calculated separately for each class of equity security. Whether or not an appropriate relationship exists between the prices of several classes of equity security pursuant to Article 32 para. 5 SESTA is assessed on the basis of the highest price paid for an equity security in comparison with its par value.

<sup>3</sup> The equity securities of the offeree company that have been acquired in the prior acquisition via an exchange against securities must be counted at their value on the date of the swap.

<sup>4</sup> If the acquiring or selling party rendered other major services in connection with the prior acquisition, such as the grant of assurances or material benefits, then the price of the prior acquisition must be increased or reduced by the value of these services.

<sup>5</sup> In its report, an auditor (Art. 25 SESTA) must examine the valuation of the equity securities referred to under para. 3, must confirm the appropriateness of the increase or reduction referred to in para. 4, and must reveal its calculations.

## **Art. 42 Indirect prior acquisition**

**(Art. 32 paras 4 to 6, SESTA)**

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If the prior acquisition was carried out indirectly pursuant to Article 30 in combination with Article 9 para. 3c, the offeror must 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 must be checked by a review body.

## **Art. 43 Settlement of the offer price**

**(Art. 32 paras 4 to 6, SESTA)**

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

<sup>2</sup> Settlement by means of exchange against securities is permitted provided cash payment is offered as an alternative.

## **Art. 44 Valuation of the securities**

**(Art. 32 paras 4 to 6, SESTA)**

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Art. 40 paras 2–4 apply by analogy to determining the value of the securities offered for exchange.

## **Art. 45 Exemptions** (Art. 32 paras 4 to 6, SESTA)

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The Takeover Board may grant exemptions from the rules contained in this section (Arts 40 to 44) to an offeror in individual cases for important reasons.

## **Chapter 5: Final Cooperation between FINMA, the Takeover Board and exchanges**

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### **Art. 46 (Art. 20 paras 4 und 5, Art. 34bis and 35 SESTA)**

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<sup>1</sup> FINMA, the Takeover Board, and the admission, disclosure and surveillance offices of the stock exchanges will provide each other, on their own initiative or upon request, with all information and relevant documents that these authorities and offices need to fulfil their individual tasks. In particular, they will notify each other if they have reason to assume that the law has been broken in a case that is to be investigated by the authority or office in question.

<sup>2</sup> In doing so, the authorities and offices involved must uphold official, professional and business secrecy and use the information and relevant documentation that they have received exclusively to fulfil their individual statutory obligations.

## **Chapter 6: Final Provisions**

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### **Art. 47 Cancellation of previous legislation**

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The Stock Exchange Ordinance-SFBC of 25 June 19975 (SESTO-SFBC) is hereby repealed.

### **Art. 48 Transitional provisions**

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<sup>1</sup> Disclosure notifications produced under the old legislation remain valid.

<sup>2</sup> Circumstances that must be reported and that occur after this Ordinance has entered into force may, if accompanied by a corresponding note upon notification and publication, be notified under the old legislation (Art.°9-23 SESTO-SFBC6) until 30 June 2009.

### **Art. 48a Transitional provisions for the amendment of 23°November 2011**

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To implement Art. 23 para. 1, the company must indicate the most recent notification by the party subject to the notification obligation on the electronic publication platform by 1 October 2012 at the latest.

### **Art. 49 Entry into force**

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This Ordinance enters into force on 1 January 2009.

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<sup>5</sup> AS 1997 2045, 2005 5671, 2007 2953 5759

<sup>6</sup> AS 1997 2045, 2007 2953 5759