瑞士修法加强要约收购内幕交易监管

Swiss revisions ramp up takeover rules, insider trading enforcement

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瑞士近期对《证券交易法》进行了修订，其中包括有关瑞士上市公司要约收购的规定。此次修订大幅度地修改了内幕交易罪的有关规定，与国际标准接轨。修订条款已于 2013 年 5 月 1 日生效。本期文章将简要介绍有关条款。

要约收购新规定

适用范围。修订后的瑞士要约收购规定将同样适用于收购至少有部分股票在瑞士证券交易所上市的外国上市公司。在此次修订之前，瑞士要约收购的规定仅适用于目标公司住所地位于瑞士并且至少有部分股票在瑞士证券交易所上市的收购。

控制权溢价。今后，在强制要约收购和自愿收购中，影响目标公司控制权的要约价格至少要与过去十二个月中收购方收购目标公司股份所支付的最高价格相等。收购方不能再向控股股东或大股东支付控股权溢价了。

更加昂贵

我们认为废止控股权溢价会使得收购瑞士上市公司变得更加昂贵。此外，值得注意的是此次修订案未规定过渡性条款，因此，如果在 2013 年 5 月 1 日之后进行要约收购，那么在 2012 年进行的股份收购将会影响要约的最低价格。为了方便控制权变动交易的进行，目标公司控股股东和公司应当考虑利用要约收购法规的灵活性，排除强制要约收购义务（“退出”）或者将有关起始点提高到 49%（“上调”）。

执行强制要约收购。如果有合理理由怀疑收购方违反了强制要约收购义务，瑞士企业并购委员会有权冻结其表决权并禁止其购买更多的股份或相关衍生品。此外，恶意违反强制收购义务的将构成刑事犯罪，并将面临最高达 1000 万瑞士法郎（1070 万美元）的罚款。因此，强制要约收购的执行在今后将变得更加有效。

要约收购程序。新法规定，股东必须至少持有 3% 的表决权才能在要约收购程序中向瑞士企业并购委员会提出法律请求，目前的规定是拥有 2% 的股份即可。因此，参与要约收购程序所要求的最低表决权将与披露大股东所要求的最低阈值一致。这意味着今后收购方将了解是否有大股东可能会提出法律请求，使得收购程序更加复杂，以及有关人数。

内幕交易新规定

扩大首要内幕人范围并纳入派生内幕人。原内幕交易法规以及新法规都对“首要内幕人”规定了大量的处罚，对信息泄露对象“派生内幕人”规定的处罚较少。首要内幕人最高可被处三年有期徒刑或罚款，新法规定如果通过内幕交易获取经济利益超过 100 万瑞士法郎的，将面临最高五年的刑期或罚款。派生内幕人最高可被处以一年有期徒刑或罚款。

修订前的法律规定首要内幕人仅限于股份公司管理人员（董事和高层管理人员）以及上市公司审计人员、公务员和政府官员，以及他们各自的助理。

首要内幕人范围扩大

新法将首要内幕人的范围扩大到能够合法直接获取内幕消息的任何人，不论他担任何种职位。此外，根据修订后的法律规定，一般情况下法人仍然不是犯罪主体，除非由于法人不完善的内部组织而无法确定犯罪嫌疑人的身份（刑法典第 102 条）。

> *此次修订大幅度地修改了内幕交易罪的有关规定，与国际标准接轨*

扩大内幕信息的概念。内幕信息包括一旦被披露，便可能对在瑞士证券交易所或其他类似机构上市的证券的价格产生重大影响的任何信息。根据此次修订，内幕信息还包括上市公司外部、具有价格敏感性的保密信息（例如，相关行业有关部门做出的重要决策，或者新的原材料资源的发现，或者现有原材料资源的耗尽）。

扩大内幕交易罪范围。新法规定首要内幕人根据其拥有的内幕信息，只要建议他人买卖瑞士上市证券的就构成内幕交易罪，即使没有披露任何内幕信息。此外，根据新法规定，内幕人在进行所有与瑞士上市证券有关的衍生品交易时也可能犯内幕交易罪，特别是上市的、非标准化的场外衍生品交易。之前的法律仅涵盖了期货这一种衍生品。

可控告对象范围扩大

扩大行政处罚范围。根据新法规定，瑞士金融市场监管机构不仅可以控告银行、基金管理公司以及证券交易商，他们还可以控告所有可能进行内幕交易的市场参与者。因此，行政处罚和刑事诉讼可以同时进行。■

The rules regarding tender offers for Swiss-listed companies have been revised as part of the revision of the Swiss Stock Exchange Act. With this revision the offence of insider trading has been extensively revised and adapted to international standards. The revised provisions have come into force on 1 May 2013. This column briefly summarises them.

Revised Swiss takeover rules

Scope of application. In future, the Swiss takeover rules will also apply in the case of tender offers for foreign companies with equity securities that are, at least in part, primarily listed on a Swiss stock exchange. Prior to the revision, the scope of application of the Swiss takeover rules required both that the target's corporate domicile is in Switzerland and that its equity securities are, at least in part, listed on a Swiss stock exchange.

Control premium. In future, the offer price in mandatory bids and voluntary bids affecting the control of the target will have to be at least as high as the highest price paid by the bidder for equity securities of the target in the preceding 12 months. Thus, it will no longer be possible to pay a control premium to a controlling shareholder, or to significant shareholders.

More expensive

We expect the abolition of the control premium to make takeovers of Swiss-listed companies more expensive. In addition, it should be noted that there is no transitional provision and that purchases of equity securities made in 2012 can therefore affect the minimum price if the offer is launched after 1 May 2013.

In order to facilitate change of control transactions, existing controlling shareholders and companies should consider making use of the flexibility granted by the takeover rules and waive the mandatory offer duty ("opting out") or raise the relevant threshold to up to 49% ("opting up").

Enforcement of the mandatory offer duty. If there is reasonable suspicion that the mandatory offer duty has been violated, the Takeover Board will in future have the competence to suspend voting rights and declare a ban on additional purchases of shares or related derivatives. In addition, intentional violations of the mandatory offer duty will constitute a criminal offence and be punishable with a fine of up to 10 million Swiss francs (US$10.7 million). As a consequence, the enforcement of the mandatory offer duty will in future be more effective.

Takeover proceedings. Shareholders must in the future hold at least 3% of the voting rights in order to request legal standing in the proceedings before the Takeover Board.

Until now, a stake of 2% was sufficient to request legal standing. Consequently, the threshold of the right to participate in the takeover proceedings will correspond to the lowest threshold for the disclosure of significant shareholdings. This means that a bidder will in future know if, and how many, significant shareholders can potentially request legal standing and thus complicate the takeover proceedings.

New insider trading rules

Expansion of the circle of primary insiders and inclusion of random insiders. Both the old and revised insider trading rules set a high range of punishment for so-called "primary insiders", and a lesser one for those they inform – so-called "secondary insiders". Primary insiders are subject to a penalty of up to three years in prison – under the revised rules, for an economic advantage of over 1 million francs they face up to five years – or fines. Secondary insiders are subject to a penalty of up to a year in prison, or fines.

Under the old law, the circle of primary insiders was tightly restricted to officers – directors and top management – and auditors of a stock corporation, civil servants and government officials, and in each case their respective assistants.

Primary insiders expanded

The revised law expands the circle of the primary insiders to anyone who, in whatever capacity, has legitimate direct access to inside information. Also under the revised rules, legal persons still do not generally qualify as offenders unless the act is that of an undetermined perpetrator whose identity cannot be established due to the poor internal organisation of his or her employer (article 102 of the Criminal Code).

> *The offence of insider trading has been extensively revised and adapted to international standards*

Extending the concept of insider information. The definition of insider information covers any confidential information which, if disclosed, is likely to significantly affect the trading price of securities that are listed on an exchange or an exchange-like facility in Switzerland. Under the revised law, insider information also includes price-sensitive confidential information originating entirely outside the relevant listed companies (e.g., industry-relevant fundamental decisions of authorities or the discovery of new, or depletion of, existing sources of raw materials).

Expansion of insider trading offence. Under the revised law, a mere recommendation by a primary insider, based on insider information, to trade in Swiss-listed securities is a criminal insider offence, even if no inside information was disclosed. In addition, under the new law an insider offence can also be committed by transactions with all derivatives of securities listed in Switzerland, including in particular with listed, non-standardised over-the-counter products. The only derivatives covered by the old law were options.

All suspects fair game

Extended application of regulatory penalties. Under the revised law, the Swiss Financial Markets Supervisory Agency may not only proceed against banks, fund management companies and securities dealers, but also against all market participants who are suspected of insider trading. As a result, regulatory and criminal procedures may be pursued in parallel. ■

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