



TOB Circular no. 3: Review of public takeover offers

of 26 June 2014 (Status as of 1 January 2017*)

1. Swiss auditing standard PS 880

According to Art. 128, para. 1 FMIA, the offeror shall, prior to publication, submit the offer to an auditing company licensed by the Federal Audit Oversight Authority pursuant to Art. 9a, para. 1 of the Audit Oversight Act or to a securities dealer for review. [1]

On 14 September 2016, the Swiss Institute of Certified Accountants and Tax Consultants adopted a Swiss auditing standard (**PS 880**) for the review of public takeover offers, which was approved by the Federal Audit Supervision Authority on 28 November 2016 and on 30 September 2016 by the Swiss Takeover Board. The PS 880 took effect on 1 January 2017. It lays down the principles which review bodies must follow when reviewing public takeover offers and the form and content of the reports they must produce concerning these. [2]

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2. Binding nature of PS 880 for securities dealers

According to section N of the introduction to the Swiss auditing standards (2010 edition), PS 880 is binding on review bodies which are members of the Swiss Institute of Certified Accountants and Tax Consultants. In the provision of auditing services, government-supervised audit firms must adhere to auditing standards which are approved by the Federal Audit Supervision Authority (see Art 1. of the Ordinance of the Federal Audit Supervision Authority on the Supervision of Audit Firms). [3]

In order to ensure a uniform and transparent review capacity, the Swiss Takeover Board also declares PS 880 (including annexes), with the exception of its paragraphs 10, 19 and 20, to be binding on securities dealers appointed as review bodies. [4]

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3. Independence of the review body

According to Art. 26, para. 2 TOO, the review body must be independent of the offeror, of the target company, and of the persons acting in concert with them. [5]

The review body is responsible for ensuring that it meets the requirements for independence in line with the practice of the Swiss Takeover Board. [6]



In order to enable its independence as a review body to be assessed, the audit company or securities dealer must submit the following information to the Swiss Takeover Board: [7]

1. Is the audit company or securities dealer providing or has it provided other services for the offeror in the context of the takeover offer, or has it been appointed to provide such services in the future? If so, what services? [8]
2. All other information which is of significance to the assessment of its independence. Securities dealers must provide information in particular on significant business relations with the offeror. [9]

In addition, the audit company must inform the Swiss Takeover Board whether it is at one and the same time the statutory auditor of the target company, the offeror, or a person acting in concert with the offeror. [10]

If the Swiss Takeover Board is of the opinion that the independence of the review body has not been established, it shall notify the review body or securities dealer and the offeror of this within three trading days of receiving the information as per paragraphs 8 to 10 above, providing reasons. [11]

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4. Review of the financing of the offer

According to Art. 27, para. 1, let. c TOO, the review body shall in particular review the financing of the offer and the availability of funds before the offer is published. The review body is to confirm that the offeror has taken the necessary steps to ensure that on the date of execution the necessary funds are available (Art. 20, para. 1 TOO). [12]

Where funds are borrowed, the review body in particular reviews the creditworthiness of the lender and those contractual clauses which enable the lender to refuse to pay out the funds. [13]

As a general rule, such contractual clauses are permissible only if they [14]

- a) correspond to a condition in the offer; [15]
- b) refer to a significant legal condition with respect to the offeror (in particular *status, power, authority, change of control*); [16]
- c) refer to the validity of a significant legal transaction stipulated in the contract (in particular the provision of collateral); [17]
- d) refer to a significant breach of contract on the part of the offeror (in particular, *pari passu, negative pledge, merger, non-payment*); or [18]

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e) refer to a significant deterioration in the offeror's ability to pay. [19]

The Swiss Takeover Board may stipulate that information about the contractual clauses be provided in the offer prospectus (Art. 25, para. 3 TOO). [20]

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5. Publication of the auditor's report in case of amendments to the offer or the offer prospectus

If the offeror amends the offer or the offer prospectus the auditor shall also prepare a brief report on the amendments concerned (Art. 27 para. 3 TOO). [21]

The offeror shall indicate in the amendment of the offer prospectus that the auditor has verified the amendment and shall provide the precise Internet address at which the German and French audit report may be obtained. If the offer documents appear in any additional language, the audit report must be translated and be made accessible in this language. [22]

6. Timeframe

This Circular is applicable from 1 July 2014. [23]

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* References to statutory and regulatory instruments have been adapted following the enactment of the Financial Markets Infrastructure Act and its implementing ordinances.