



## M & A Newsletter Switzerland

# Recommendation of the Swiss Take Over Board of March 7, 2005

### **Swiss Take Over Board ("TOB") announces, as a change of its prior practice, that it may commence investigations *ex officio* prior to a request made by a party**

In its recommendation of March 7, 2005 regarding the public offer of AFB Investment S.A. Luxembourg for all of the shares held by the public in Forbo Holding SA, Luxembourg, the TOB announced that a formal proceeding can also be initiated by the TOB *ex officio* prior to a request being made by a party. The TOB announced that it will commence a proceeding *ex officio* if prior to the request of a party it is made public that a public offering will be made and if there are reasons to believe that the principle of transparency and fairness of the public offering as well as the principle of equal treatment of the investors is jeopardized.

### **Agreement by target company to pay a break-up fee ("cost coverage") does not violate Swiss takeover law and regulations, where break-up fee is reasonable**

In its ruling, the TOB held further that the payment of a break-up fee ("cost coverage") in the amount of CHF 800'000 by the target company to the offering party, under the factual setting at hand, did not violate Swiss take over law. In the case at hand, the target company owed a break-up fee to the offering party if the offering party's tender offer did not succeed because, in the alternative, (i) less than 66.67% of the shares were tendered to the offering party, (ii) or the target company did not agree to change its Articles of Incorporation by deleting certain transfer restrictions (percentage and group clause) or (iii) the target's board of directors did not pass a resolution whereby the offering party or its designated and controlled Swiss subsidiary was to be registered as shareholder with voting rights. Absent a competing offer the TOB left the question open, whether or not a similar offer

for cost coverage had to be made by the target to competing offering parties. The TOB also argued that, in the case at hand, the target company undertook to assure equal treatment of competing offers. Finally, the TOB concluded that the amount of the agreed cost coverage was not sufficiently high to coerce a shareholder to accept the offer in order to prevent a substantial cash drain.

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