ARTICLES

PROTECTION AGAINST HOSTILE TAKEOVER AND THE EXERCISE OF SHAREHOLDER VOTING RIGHTS IN SWITZERLAND

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1. Introduction

Although the government of Switzerland is internationally renowned for its neutrality, the same can hardly be claimed of Swiss public stock corporations.¹ Acquisition activities of Swiss public corporations with respect to foreign companies have been markedly aggressive in recent years.

Among the successful unfriendly takeover campaigns² for foreign

¹ The stock corporation (Aktiengesellschaft) is the preferred business form in Switzerland. As of December, 1988, there were 147,113 registered Swiss stock corporations, which is roughly half the number of registered Swiss business entities. Immer Mehr Aktiengesellschaft und Vereine, Tages-Anzeiger, Jan. 21-22, 1989, no. 17 at 35. Since as a practical matter only public corporations come into question as possible hostile takeover candidates (see Immenga, Öffentliche Übernahmeangebote, 47 Schweizerische Aktiengesellschaft 89, 90 (1975) [hereinafter SAG]), the scope of this Article is limited to the several hundred Swiss stock corporations whose shares are listed on one or more of Switzerland’s seven stock exchanges [hereinafter public corporations].

² As used throughout this Article, terms such as “unfriendly takeover” or “hostile takeover” refer generally to the acquisition of control of a target company against the wishes of management through secondary market stock purchases; the term “tender offer” refers more specifically to the making of a public offer to purchase shares di-
companies mounted by Swiss public corporations in the recent past are Nestlé S.A.’s 1985 takeover of Carnation Foods, a U.S. food conglomerate, for $3 billion; Ciba-Geigy AG’s 1987 unfriendly acquisition of the San Jose firm Spectra-Physics, Inc., the world’s largest laser producer; and the 1988 takeover, also by Nestlé, of the British candy manufacturer Rowntree-MacIntosh for a purchase price of 6.6 billion Swiss francs. Less successful but equally unfriendly in nature were Gurit-Heberlein AG’s unsuccessful attempt to gain majority control of its long-standing U.S. joint venture partner, Essex Chemical Corporation, in 1988; Sandoz AG’s failed bid to acquire the U.S. spice manufacturer, McCormick & Co., Inc.; F. Hoffmann-La Roche & Co. AG’s unsuccessful 1988 tender offer for Sterling Drugs, Inc. in the amount of $4.3 billion; and Jacobs’Suchard AG’s unsuccessful 1988 tender offer for Rowntree-MacIntosh. Uncontested acquisitions by Swiss stock corporations of foreign corporations, in particular U.S. companies, have also increased in frequency in recent years.

rected at a target company’s shareholders.


Spectra-Physics, San José: Späte Reue ist Teuer, SHZ, Oct. 6, 1988, no. 40 at 37. Ciba-Geigy is a Basel-based chemical and pharmaceutical concern.


Essex Chemical/Gurit-Heberlein: Die Geschichte ist mehr als peinlich, SHZ, Aug. 18, 1988, no. 33 at 33. Takeover by the Swiss chemical and textile firm was avoided through the acquisition of Essex Chemical by Dow Chemical Co. Dow Chemical als “white knight” für Essex, Neuer Zürcher Zeitung [NZZ], Sept. 7, 1988, no. 208 at 35.

Rückzug ins Röduit?, NZZ, Jan. 23-24, 1988, no. 18 at 33. Sandoz AG is a Basel-based chemical and pharmaceutical concern.

Nabisco-Roulette als Eisbergs spitze: Merger-Mania, SHZ, Nov. 17, 1988, no. 46 at 1. Sterling Drugs was rescued by “white knight” Eastman Kodak from takeover by the Basel-based chemical and pharmaceutical concern Hoffmann-La Roche. Id.

Although its attempt to acquire Rowntree was defeated by Nestlé, see supra note 5, Jacobs Suchard, a Neuchatel-based chocolate and coffee manufacturer, reaped a profit of approximately 460 million Sfr. through the subsequent sale of its Rowntree shareholdings to Nestlé. Elegant entledigt sich Jacobs seiner 400-Millionen-“Bürde”, Tages-Anzeiger, Apr. 21, 1989, no. 92 at 33.

See Über 300 Fusionen von Schweizer Firmen, Tages-Anzeiger, Jan. 5, 1989, no. 3 at 31 (increase in total foreign acquisitions from 206 in 1987 to 315 in 1988, and in acquisitions of U.S. companies from 15 to 25).
Boston, Inc., was arguably limited to forty-five percent largely because of the restraining effect of applicable ownership limitations under the Glass-Steagall Act, which regulates the separation of U.S. commercial and investment banking activities.\textsuperscript{11}

Within Switzerland, Swiss corporations have typically been praised for being "dynamic" in their use of unfriendly takeover tactics to acquire control of foreign companies.\textsuperscript{12} At the same time, however, many within the Swiss business community express the view that an unfriendly acquisition — insofar as a Swiss corporation builds its target — "does not correspond to the proper business policies of a respectable Swiss firm."\textsuperscript{13} This view is echoed by the current Swiss Stock Corporation Act,\textsuperscript{14} which permits the board of directors of a Swiss corporation,\textsuperscript{15} with the approval of its shareholders, to erect formidable, if not insurmountable, barriers against unfriendly takeovers, and in particular against unfriendly takeovers by foreign acquirors.

The striking incongruity between the quasi-immunity from foreign takeover available to Swiss stock corporations under Swiss law and their avid pursuit of target corporations in foreign countries through the use of hostile takeover tactics has provoked international comment and criticism. In 1988, for example, influential British politicians questioning the right of Swiss stock corporations to freely acquire im-


\textsuperscript{12} \textit{See}, e.g., Es wird kalt um den Aktionär, Die Weltwoche, Dec. 31, 1987, no. 53 at 13; Hartmann, \textit{Takeovers in Switzerland}, Finanz & Wirtschaft [hereinafter FuW], Mar. 16, 1988, no. 21 at 1.

\textsuperscript{13} Vinkulierung und unfriendly takeovers: Züge einer Gewaltaktion, SHZ, Aug. 4, 1988, no. 31 at 13 (statement of Dr. H. Fluckiger, president and director of Berne Insurance Company)(“Der 'unfriendly takeover' entspricht nicht der . . . doch recht wohlanstandigen Geschäftspraxis von angesehenen Schweizer Firmen”). \textit{See also} Hartmann, \textit{supra} note 12 (Swiss media does not consider takeover contests in Switzerland to be proper behavior).

\textsuperscript{14} The Swiss Stock Corporation Act (Aktiengesetz) is composed of Section 26, Articles 620-763 of the Swiss Code of Obligations (Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivil-gesetzbuches (Fünfter Teil: Obligationenrecht), vom 30. März 1911 (SR 220)) [hereinafter OR].

\textsuperscript{15} As the minimum duties and powers of the \textit{Verwaltungsrat} under the Swiss Stock Corporation Act correspond generally to those of the board of directors of a U.S. stock corporation, the term "board of directors" will be used to refer to the \textit{Verwaltungsrat} throughout this Article.

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important British companies while being permitted under Swiss law to shut out British investors — demanded investigation by the U.K. Monopolies and Mergers Commission of the takeover bids of Nestlé and Jacobs Suchard for Rowntree-MacIntosh. Similarly, subsequent to the founding of the CSFB by First Boston and Credit Suisse, and the consequent increase of Credit Suisse's influence in the Wall Street investment banking market, a member of the U.S. Securities and Exchange Commission (SEC) pointed to Switzerland as an example of a country whose corporations were actively involved in the acquisition of foreign corporations while enjoying de facto immunity from takeover by foreign acquirors. In the wake of the Nestlé/Rowntree takeover, the Commission of the European Community (EC) contemplated including a reciprocity clause in its draft guidelines on public tender offers, prohibiting a bidder from a non-EC country — such as Switzerland — from making a tender offer for an EC target company if reciprocal takeover conditions did not exist in the bidder's country of incorporation.

The rising chorus of international criticism aimed at the de facto barriers against foreign takeovers in Switzerland has led to a certain amount of discomfort in Swiss financial and political circles. Swiss politicians, among others, fear a possible boomerang effect in light of the extreme dependency of Switzerland's economy on access to international markets and its corresponding vulnerability to takeover reciprocity requirements restricting such access. Within the Swiss financial sector, it is feared that continued restrictions on the acquisition of Swiss title shares by foreign investors could lead to a decline in international demand for other Swiss financial instruments as well, resulting in an

16 Neue Phase im Übernahmekampf um Rowntree, NZZ, May 7-8, 1988, no. 106 at 35.
17 U.S.-Kritik an der Schweizer Vinkulierungspraxis, NZZ, Nov. 11, 1988, no. 264 at 33. Such remarks were coupled with a reference to the possible need for punitive countermeasures. Id.
19 See, e.g., Delamuraz kritisiert Namenaktien-Vinkulierung, Tages-Anzeiger, June 18, 1988, no. 140 at 33 (Swiss Federal Minister Jean-Pascal Delamurz); Zuwachs und Reformbereitschaft, FuW, Sept. 24, 1988, no. 75 at 3 (Dr. Markus Lusser, president of the Swiss National Bank); Eine Denkpause in der Aktienrechtsreform?, NZZ, Jan. 28-29, 1989, no. 23 at 33 (Swiss corporate law professor and practitioner Dr. Peter Forstmoser).
20 Many Swiss public corporations achieve from 70-80% of their total corporate turnover outside Switzerland; in the case of certain larger firms, such as Nestlé, Hoffmann-La Roche, and Ciba-Geigy, this figure is over 95%. SHZ-Liste: Oft im Verborgenen, SHZ, June 2, 1988, no. 22 at 1.
increase in the cost of raising capital for Swiss corporations and a decline in the significance and status of Swiss stock exchanges.\textsuperscript{21} Others point to a possible long-term decline in innovation and efficiency in the absence of the threat of hostile takeover.\textsuperscript{22}

In the face of such concerns, a number of Switzerland's largest public corporations — conscious of their dependence on international as well as domestic equity financings — have taken steps to eliminate existing prohibitions on the acquisition of title shares by foreigners. Such steps, however, have typically been accompanied by the imposition of restrictive stock registration and voting limits.\textsuperscript{23} Indeed, efforts inside many, if not most, corporate boardrooms in Switzerland have been devoted to the sharpening, rather than the easing, of stock transfer and voting restrictions, and to ensuring that revisions to the Stock Corporation Act will provide sufficient protection against unwanted Swiss, as well as foreign, raiders in the future. Over the past few years Switzerland has experienced its own "hostile takeover wave," hardly comparable in size to that of the United States but nonetheless causing alarm among Swiss board members unaccustomed to such events.\textsuperscript{24} In the absence of laws, rules, or regulations governing the conduct of hostile takeover contests in Switzerland, the new breed of "Swiss raider" has typically been able to amass a substantial amount of stock on the secondary market without making a tender offer to shareholders and with-

\textsuperscript{21} See, e.g., Hartmann, \textit{supra} note 12; \textit{Vinkulierungspraxis: Tettamenti-Syndrom}, SHZ, Apr. 21, 1988, no. 16 at 1; \textit{Erholungskurs für den Finanzmarkt Schweiz}, NZZ, July 9-10, 1988 no. 158 at 33, 34. See also \textit{Den Aktionärsblues hoch gesungen und dabei froh gesecht}, Tages-Anzeiger, Aug. 13, 1988, no. 187 at 31 (questioning listing on Swiss stock exchanges of companies whose shares are practically unpurchaseable).

\textsuperscript{22} See, e.g., \textit{Rückzug ins Rüdt}, \textit{supra} note 7, at 34 (stock market is gauge of efficiency and competitive ability; shutting down or restricting mechanism could impair economically desirable optimization of resources).

\textsuperscript{23} In November, 1988, subsequent to its unfriendly takeover bid for Rowntree, Nestlé announced that it would allow foreigners to acquire title shares, subject to the simultaneous imposition of three percent limits, applicable to both Swiss and foreign investors, on the maximum amount of title share capital registrable to, and the maximum number of total share capital to be voted by, any single investor or investor group. \textit{Weichere Vinkulierung von Nestlé-Aktien}, NZZ, Nov. 18, 1988, no. 270 at 33. The Nestlé decision set a precedent which has thus far been followed by a limited number of other major Swiss public corporations, including the Swiss Reinsurance Company, the Zürich Insurance Company, and, more recently, BBC Brown Boveri and Ciba-Geigy. \textit{See infra} note 46.

\textsuperscript{24} The attention attracted by the wave of hostile takeover attempts within Switzerland is attested to by the accompanying wave of recently published or to be published German-language materials. Especially recent are the following: A Kuy, \textit{DER VERWALTUNGSRAT IM UEBERNAHMENKAMPF} (1989); M. Steinmann, \textit{PRAEVENTIVE ABWEHRMASSNAHMEN MIT MITTELN DES AKTIENRECHTES} (1989); R. Watter, \textit{UNTERNEHMENSUEBERNAHMEN} (1990).
out the knowledge of the target corporation's board of directors. Despite such substantial raider advantages, however, attempts in Switzerland to wrest corporate control away from an unwilling board have thus far enjoyed a success rate approaching zero, largely because of the degree of control over corporate affairs granted Swiss boards of directors under existing Swiss laws and bank conventions. Currently, a non-Swiss investor's chances of successfully acquiring a Swiss corporation largely depend on whether or not there is a controlling shareholder willing to sell his shares: indeed, as one commentator has remarked, an objective observer might well ask himself if it is, indeed, possible to take control of a company in Switzerland without finding the company's officers, board of directors, and the entire Swiss legislature standing, whining, before one's door.\(^\text{25}\)

The purpose of this Article is to examine the various layers of takeover protection, both direct and indirect, shielding Swiss public stock corporations from hostile takeover under both the Swiss Stock Corporation Act and the currently proposed legislative revisions thereto. A secondary objective is to explore the extent to which such protection is inadequate in protecting Swiss stock corporations and their shareholders from the evils associated with hostile takeover attempts, while being overly successful in insulating corporations and shareholders from certain benefits associated with hostile takeovers. Part 2 presents an overview of Swiss title and bearer shares, the ownership structure of Swiss public corporations, and the various hostile takeover defenses, against foreign as well as Swiss would-be acquirors-of-control, available to Swiss public corporations under current law. Part 3 examines the effectiveness of these defensive measures in the context of actual hostile takeover contests that have taken place in Switzerland. Part 4 outlines proposed legislative revisions to the Swiss Stock Corporation Act and examines the possible impact of such revisions on hostile takeover activity in the future. The control over corporate affairs afforded Swiss boards of directors is arguably influenced less by the cornucopia of takeover defenses made available by current Swiss law

\(^{25}\) Aktionärschutz: Vom "Zmorge" zum "Zvieri", SHZ, Mar. 12, 1987, no. 11 at 1 ("... der unabhängige Beobachter fragt sich, ob es doch — sogar — in unserem Lande noch möglich ist, eine Gesellschaft zu übernehmen, ohne dass Management, Verwaltungsrat und Regierungsrat schon jammern vor der Türe stehen ... "). Cf. Ebenroch & Eyles, Die Beschränkung von Hostile Takeovers in Delaware, 34 Recht der Internationalen Wirtschaft 413, 415 n.21 (1988) (citing Browne & Rosen gren, New Eng. Econ. Rev. July-Aug. 1987, 13, 14) (only 10% of all of the U.S. companies that were made the subjects of tender offers during 1985 were able to prevent ultimately being taken over).
than by certain legal and practical factors affecting the exercise of shareholder voting rights within Swiss stock corporations. Thus, Part 5 describes shareholder voting mechanisms under the Swiss Stock Corporation Act and certain guidelines of the Swiss Bankers' Association, and Part 6 examines the impact of inadequate investor and corporate disclosure, including the impact of the so-called "hidden reserves," on the exercise of shareholder voting rights in Switzerland. Finally, the Article summarizes certain inadequacies of the current Swiss Stock Corporation Act and proposed revisions thereto with respect to the problems currently posed by hostile takeovers within Switzerland, and suggests a new avenue for addressing such problems.

2. Takeover Defenses Available Under the Swiss Stock Corporation Act

2.1. Swiss Shares and Share Corporations Generally

The Swiss Stock Corporation Act provides for two categories of voting stock — title shares and bearer shares. Swiss public stock corporations typically offer both forms of voting stock to the investing public. Although profit-sharing participation certificates (PS) are also issued by Swiss public corporations, PS are not considered "stock" under current law because no voting or other corporate membership rights attach to such certificates.26 Changing the number of issued bearer shares and title shares, such as through a conversion of bearer shares into title shares or vice-versa, requires the adoption of an appropriate amendment to the certificate of incorporation.27

Under the Swiss Corporation Act, shares of a Swiss corporation are required to have a minimum par value per share of at least 100 Sfr.28 In the absence of articles in the certificate of incorporation setting forth stricter approval requirements, each new share issuance requires the approval of a majority of the voting shares whose holders are present or represented at a shareholder meeting (hereinafter a simple shareholder majority).29 Preemptive shareholder rights attach to each

26 See OR, art. 692, para. II (prohibiting non-voting stock). Issued PS capital has reached levels in the past equal to 20-40% of the issued share capital of some public corporations. E. TILLMANN, DAS DEPOTSTIMMRECHT DER BANKEN, Schweizer Schriften zum Handels-und Wirtschaftsrecht [SSHW], Vol. 80, 128 (1985). See infra note 48.

27 OR, art. 626. (corporation's certificate of incorporation must state exact number of bearer shares and title shares issued). A Swiss corporation's certificate of incorporation (Statuten) and bylaws (Reglement) are basically equivalent to a U.S. corporation's certificate of incorporation and by-laws.

28 OR, art. 622, para. III.

29 See generally OR arts. 650-53. Although as a formal matter the Stock Corpora-
new issuance of shares to the extent that such rights are not excluded in the certificate of incorporation or by the approval of a simple shareholder majority, in the absence of a higher shareholder approval standard set forth in the certificate of incorporation.\textsuperscript{30} In the latter case, the specific instance of preemptive rights exclusion must be justified by sufficient objective grounds for the exclusion.\textsuperscript{31} The Swiss Stock Corporation Act does not currently allow a corporation to have authorized but unissued shares;\textsuperscript{32} nor does it permit the retirement of issued shares of a Swiss stock corporation, other than pursuant to a capital reduction.\textsuperscript{33}

Even though Article 659 of the Stock Corporation Act formally forbids most corporate repurchases, including defensive repurchases during unfriendly takeover contests, corporate repurchases generally are tolerated to the extent that share capital and legally-required reserves are not thereby impaired.\textsuperscript{34} Shares of "reserve" stock, issued stock that has been repurchased by or has otherwise landed in the possession of the issuer, may be reissued at a later point in time,\textsuperscript{35} without the need to
grant preemptive rights with respect to the reissuance or to obtain shareholder approval therefor to the extent provisions in the certificate of incorporation do not provide to the contrary.\textsuperscript{36}

A key difference between bearer and title shares is that while the identity of a corporation's bearer shareholders need not be made known to the corporation, title shareholders are required to be registered, by name and address, in a stock ledger maintained by the corporation.\textsuperscript{37} As a rule, maintenance of the corporate ledger is the responsibility of the board of directors.\textsuperscript{38} The registration of banks or other institutions in the corporate stock ledger as fiduciary or "nominee" title shareholders is normally permitted only in exceptional situations, subsequent to discussions with the board.\textsuperscript{39}

The transfer of rights associated with bearer shares is perfected vis-à-vis the issuing corporation through presentation of the underlying share certificate or, with respect to dividend rights to bearer shares, through submission of the dividend coupon normally attached to the share certificate.\textsuperscript{40} On the other hand, while a transfer of rights associated with title shares is technically completed upon presentation of the underlying share certificate and proof of an unbroken chain of endorsement,\textsuperscript{41} most of the thus-transferred rights may be exercised vis-à-vis due speed ("mit tünlicher Beschleunigung"). OR, art. 659, para. III.

\textsuperscript{36} Judgment of the First Civil Division of March 27, 1962, 88 BGE II 98, 103-04 (no shareholder approval required under statutes for corporate stock repurchases and selective transfer of re-purchased stock to member of majority shareholder group; neither preemptive shareholder rights nor shareholder rights to equal treatment applicable to reissuance). Until reserve stock is re-issued, all voting rights attaching to such stock are temporarily suspended. OR, art. 659, para. V.

\textsuperscript{37} OR, art. 685, para. I.

\textsuperscript{38} See U. BENZ, AKTIENBUCH UND AKTIONAERSWECHSEL, 63 SSHW, Vol. 26 (1981) (OR, art. 721, para. II entitles and requires board to maintain corporate ledger absent statutory provisions to the contrary).

\textsuperscript{39} See E. TILLMANN, supra note 26, at 27, 32. Cf. Judgement of the First Civil Division of December 13, 1955, 81 BGE II 534, 541 (where fiduciary registrations not statutorily forbidden, registered fiduciary holder entitled to follow voting instructions of beneficiary owner).

\textsuperscript{40} OR, art. 967, para. I. See FORSTMOSER & MEIER-HAYOZ, supra note 31, § 39 at 266 n. 14; H. SCHMID, DIE UMWANDLUNG VON INHABER- IN NAMENSAKTIONEN UND UMGEGEHRT 19 (1956); F. BUERGI, KOMMENTAR ZUM SCHWEIZERISCHEN ZIVILGESETZBUCH, Das Obligationenrecht, Part V b/1, Art. 683 OR, comment 19 at 280 (1957). To enable holders of bearer shares to retain their anonymity, such services are normally performed by Swiss banks acting under power of attorney.

\textsuperscript{41} OR, arts. 684, para. II, 967 paras. I, II. See FORSTMOSER & MEIER-HAYOZ, supra note 31, § 39 at 266 n. 15. Cf. Judgment of the First Civil Division of November 27, 1961, 87 BGE II 249, 256 (registration does not effect but presupposes transfer of rights relating to title shares); Judgment of the First Civil Division of June 23, 1964, 90 BGE II 164, 173 (same). Further proof, as to the material entitlement of each new acquiror (art. 974 OR), is rarely required by Swiss public corporations. See R. LYK, ENTWICKLUNGSTENDENZEN BEI DER ÜBERTRAGUNG SCHWEIZERISCHER KONTIERTEN NAMENAKTIVEN, 51 SAG 9, 10 (1979).
the issuing corporation only after registration of the new acquiror in
the corporate stock ledger has been effected. Such ledger registration
is a mere formality and must be carried out in the absence of certificate
of incorporation provisions to the contrary. The Stock Corporation
Act currently places few restrictions, however, on the extent to which a
corporation, through its certificate of incorporation, may empower or
require its board of directors to deny the registration of title share
transfers. A stock corporation's certificate of incorporation may, in-
deed, forbid the transfer of title shares, or require unanimous share-
holder approval for the registration of such transfers.

No substantial difference exists between the respective rights af-
forded title shareholders and bearer shareholders under the Swiss Stock
Corporation Act, other than those relating to a corporation's right to
restrict the free transferability of title shares but not that of bearer
shares. Because most Swiss corporations have, at least until recently,
generally prohibited the acquisition of their title shares by foreign in-
vestors, trade in title shares of such corporations is effectively limited

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42 See OR, art. 685, para. IV (persons registered in corporate stock ledger to be
regarded as title shareholders in relationship to corporation); FORSTMOSER & MEIER-
HAYOZ, supra note 31, § 39 at 266-67 n. 15. According to Swiss case law, certain
rights relating to transferred title shares may be exercised by the new acquiror regard-
less of whether registration is complete. See infra note 77 and accompanying text.
43 OR, art. 686, para. I; Judgment of the First Civil Division of March 21, 1950,
76 BGE II 51, 67.
44 Limitations exist under OR, art. 686, para. IV, for example, as to registration
denials in the case of involuntary title share transfers, such as through inheritance laws.
See generally P. Lutz, VINKULIERTE NAMENAKTIEN, INSBESONDERE IHR ERWERB
OHNE RECHTSGESCHÄFT, 110 SSHW (1988). See also Judgment of the First Civil
Division of May 29, 1984, 110 BGE II 293, 295.
45 OR, arts. 627 1. 8, 684 para. I, 686 para. I OR. Such charter provisions are
rare but not unknown. U. Benz, supra note 38, at 78 n.18.
46 See, e.g., Sind vinkulierte Namenaktien börsenfähig?, NZZ, Apr. 30-May 1,
1988, no. 100 at 33; Arnold, supra note 32, at 42; Dunant and Piéard, Regional
Developments: Switzerland, 23 INT. LAW. 571, 573 (1989). Certain major Swiss pub-
lic corporations have recently followed Nestlé's precedent in allowing title shares to be
acquired by foreigners. See e.g., Künftig auch Ausländer im BBC-Aktienregister,
NZZ, Mar. 24, 1990, no. 69 at 17 (foreign ed.) (in change of practice under "general
clause," BBC board to grant registration to foreign investors; maximum permissible
ownership of title share capital, applicable to all investors, of seven percent); Ciba-
Geigy vereinfacht die Kapitalstruktur, NZZ Feb. 2, 1990, no. 44 at 13 (foreign ed.)
(board proposal to allow title share ownership by foreign investors; existing two percent
limits on maximum ownership of title share capital and maximum voting of total share
capital to remain in place); Zürich-Namenaktien auch für Ausländer, Frankfurter
Allgemeine Zeitung [hereinafter FAZ], May 24, 1989, no. 118 at 21 (foreign investors
to be allowed to acquire not only debt but also accompanying options for title shares of
"Zürich" Insurance Company); Jacobs Suchard öffnet sich Ausländern, NZZ, June
22, 1989, no. 142 at 35 (preliminary decision of Nestlé rival Jacobs Suchard to alter
board policy prohibiting acquisition of title shares by foreign investors); Schweizer Rück
mit deutlich höherer Ausschüttung, NZZ, Sept. 9, 1989, no. 226 at 33 (foreign inves-
tors to be allowed to acquire up to three percent of Swiss Reinsurance Company title
to fewer than ten million potential individual and corporate Swiss investors. Because of the limited trade in Swiss title shares, such shares are rarely traded over foreign stock exchanges. The more limited demand for, and the greater difficulty in transferring, title shares in comparison to bearer shares are reflected in the price relationships between the two categories of shares, with stock market prices for a Swiss corporation’s title shares generally twenty to fifty percent lower than those for the corporation’s bearer shares.47

The ability of a Swiss public corporation to issue a sufficient number of restricted title shares to prevent control of the company from being exercised solely by virtue of bearer shareholdings is limited by the typically more significant role that bearer shares play in the equity-financing of Swiss public corporations due to the larger available market and generally higher market price for bearer shares.48 According to conservative estimates, at least half of all holders of Swiss bearer shares are foreign investors.49 No official statistics are available, however, since anonymity is the most central feature of bearer shares. Even though a Swiss corporation may itself be aware of the distribution of its bearer shares in the hands of foreign shareholders,50 such information,
or other information as to the composition and structure of the corporation’s shareholder base, will be made available to the public only in exceptional circumstances. ⁶¹ Despite the lack of precise information regarding the shareholder composition of Swiss stock corporations, it cannot be overlooked that many Swiss stock corporations—although “public” in the sense of offering shares listed on a stock exchange and having an accordingly broad shareholder base—are effectively immune from hostile takeover due to unevenly dispersed voting control. ⁶² There exist many so-called “mixed” public corporations in Switzerland, i.e., corporations in which voting power is distributed between, on the one hand, a large number of unrelated shareholders, none of whom possess enough stock to exercise a controlling influence, and, on the other hand, one or several major shareholders who effectively wield control through ownership of a relative or even an absolute majority of issued shares. ⁶³ The plentitude of such mixed public corporations is not entirely surprising in light of the high number of major business entities in Switzerland that remain entirely privately-owned. ⁶⁴

2.2. Vinkulierung of Swiss Title Shares

2.2.1. Adoption and limitations on permissibility of Vinkulierung

The existence of provisions in the certificate of incorporation empowering a corporation to refuse to register title share transfers is known as Vinkulierung. ⁶⁵ Under current law, a Swiss corporation may

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⁶¹ M. BOEMLE, UNTERNEHMUNGSFINANZIERUNG 156 (6th ed. 1983). Cf. Opposition gegen die Vinkulierungsbestimmungen der Ciba-Geigy, NZZ, May 5, 1988, no. 104 at 33 (existence of a single shareholder holding more than 2% of Ciba-Geigy’s title shares revealed at shareholders’ meeting held to adopt 2% limit on amount of registrable title share capital per investor).

⁶² M. BOEMLE, supra note 51, at 155; L. HAUNREITER, DIE Beteiligung an AKTIONSGESELLSCHAFTEN 9 n.7 (1981). Special incentives may nonetheless exist for launching unfriendly takeover attempts against such corporations. Cf., e.g., infra note 255.

⁶³ See M. BOEMLE, supra note 51 (pointing to Jacobs Suchard, Globus, Losinger, Sika Finanz, and Jelmoli as examples). Thus, after obtaining 62% voting control of Jacobs Suchard AG from Klaus Jacobs, U.S. tobacco and food concern Philip Morris Co. was able to launch a successful public tender offer for the remaining Suchard shares. See Ein kapitaler Paketzuschlag für Klaus J. Jacobs, NZZ, July 11, 1990, no. 158 at 33; Philip Morris hat nun 99.4% an Suchard, Tages-Anzeiger, Sept. 21, 1990, no. 219 at 35.

⁶⁴ See, e.g., Familienunternehmen in der Schweiz: Klub Schweizer Riesen, SHZ, June 29, 1989, no. 26 at 25 (40 of 100 largest business entities in Switzerland privately owned; 170 of Switzerland’s 500 largest trade, service, and industrial business entities in private hands).

⁶⁵ The term stems from the Latin word Vinkul, meaning shackle or chain.
require its board of directors under Vinkulierung provisions to deny registration with respect to certain stipulated categories of acquisitions, e.g., those by foreign citizens or those exceeding a threshold number or percentage of title shares; alternatively, it may grant its board of directors discretion, again with respect to certain stipulated categories, to deny title share registration. The Vinkulierung provision broadest in scope, however, is the so-called "general clause," which grants a corporation's board of directors discretion to refuse any or all registration attempts, without having to disclose the grounds therefor. For practical reasons, the general clause is a preferred Vinkulierung provision among Swiss public corporations and is normally adopted in combination with other types of Vinkulierung provisions. As a rule, the inclusion of a general clause in a corporation's certificate of incorporation will be accompanied by a provision authorizing the board of directors to formulate internal policies outlining specific instances in which registration of title share transfers will be denied.

In the absence of corporate charter provisions to the contrary, restrictions on the registration of title share transfers may, under current law, be adopted or eliminated upon approval of a simple shareholder majority. The Swiss Stock Corporation Act does not presently contain stricter approval requirements explicitly applicable to the adoption of "post-issuance Vinkulierung", i.e., amendments to the certificate of incorporation for either the adoption or sharpening of Vinkulierung applicable to issued title shares or to a partial or total conversion of issued bearer shares into title shares subject to Vinkulierung. The Swiss

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68 OR, art. 686, para. II. See, e.g., David gegen Goliath, supra note 32 (refusal of Sulzer AG management, without comment, to register ten Sulzer title shares in name of highly respected Geneva industrialist). The board of directors must nonetheless have some basis for its refusal under a general clause. See text accompanying infra note 70.


66 The certificate of incorporation of Sandoz AG, for example, currently requires the board of directors to deny, other than in exceptional cases, the registration of acquisitions in excess of two percent of the company's outstanding title shares, permit the board to deny the registration of title share acquisitions by foreign citizens or competitors of Sandoz, and further authorize the board, under a general clause, to deny any and all registration requests. Schärfere Vinkulierungspraxis, SHZ, Apr. 21, 1988, no. 16 at 37; Sandoz-Vinkulierungsbestimmungen gutgeheissen, NZZ, May 4, 1988, no. 103 at 33.

60 Arnold, supra note 32, at 42. Such policies play a significant role in the enforcement of title share transfer restrictions through Swiss banks. See infra note 115 and accompanying text.

69 OR, art. 703, para. IV. See Böckli, supra note 47, at 150.

61 Cf. F. Von Godein & H. Wilhelmi, Kommentar Zum Aktiengesetz Vom 6 September 1965, § 68 AktG, comment 10 at 363 (4th ed. 1971) (West German stock corporation law (Aktiengesetz) requires approval of all current shareholders for introduction of post-issuance Vinkulierung) [emphasis added].
Federal Tribunal has held, however, that post-issuance Vinkulierung provisions may not be applied retroactively to affect certain vested rights of current shareholders, including the vested right to remain a shareholder of the corporation. A further limitation on the permissibility of post-issuance Vinkulierung recognized by legal commentators is the requirement that the degree of Vinkulierung adopted neither unduly restrict the freedom of transfer of existing shareholders in light of the corporate interests at stake, nor treat shareholders unequally in the absence of sufficient justifying grounds therefor.

"Lock-up" provisions requiring a supermajority for the elimination of existing takeover defense protections in the certificate of incorporation, such as a Vinkulierung provision, may also, in the absence of provisions in the certificate of incorporation to the contrary, be adopted upon a simple shareholder majority. Since, as a matter of current law, takeover defense lock-up provisions themselves may be eliminated only upon approval of two-thirds of the total issued voting shares, an approval standard difficult for Swiss public corporations to achieve, such lock-up provisions provide an automatic double layer of protection against a hostile takeover and the replacement of existing management by the new acquiror.

62 Judgment of the First Civil Division of August 30, 1983, 109 BGE II 239, 243 (board refusal to register bearer shareholder as title shareholder subsequent to conversion of bearer shares into restricted title shares impermissible).

63 See Botschaft, supra note 29, § 211.23 at 81; FORSTMOSER & MEIER-HAYOZ, supra note 31, § 39 at 270 n.28; W. Wuerzer, Die Zuordnung der Rechte aus Gespaltenen Aktien 42 (1982). For example, this requirement would prevent a corporation from adopting a general clause granting its board unlimited discretion to deny registration to prevent a control takeover that could be prevented through the adoption of a less intrusive measure, such as a maximum limit on the number of registrable title shares.

64 OR, art. 703. See FORSTMOSER & MEIER-HAYOZ, supra note 31, § 20 at 153 n.13; Meier-Schatz, supra note 31, at 111. No limitations exist with respect to the percentage of shareholder approval which may be required under such a lockup provision. Cf., e.g., Sandoz plant Walle gegen Übernahmeversuche, NZZ, Apr. 22-23, 1989, no. 93 at 33 (charter amendment of Sandoz AG to require three-fourths shareholder approval for amendment to “general clause”); Verwendung üppiger Markzuläufe bei Nestlé, NZZ, Apr. 27, 1989, no. 97 at 33 (charter amendment to require approval of three-fourths of represented shares at meeting at which two-thirds of issued voting share capital is present for alteration of Nestlé Vinkulierung and voting rights limitations); Künftig auch Ausländer im BBC-Aktienregister, supra note 46 (charter amendment to require approval of three-fourths of represented shares at meeting at which at least fifty percent of issued share capital present for alteration of newly-proposed limit on stake in Brown Boveri title share capital).

65 OR, art. 648, para. 1 (approval of two-thirds of total issued voting stock necessary for elimination of supermajority provisions regarding certain corporate actions); Meier-Schatz, supra note 31, at 112 (OR, art. 648 applies to elimination of lock-up provisions for Vinkulierung and other voting restrictions in the certificate of incorporation).

66 See, e.g., David gegen Goliath, supra note 32 (high quorum and supermajority
Where a corporation’s certificate of incorporation makes registration dependent on the possession of certain qualifications, such as Swiss citizenship, but does not grant the board of directors discretion to deny registration in other cases, the board may not refuse to register title shares of an acquiror possessing the required qualifications. Legal authority is split, however, on the question of whether an acquiror, as opposed to the selling title shareholder, has standing in such instances to bring suit compelling registration. The sole limitation on the ability of a board of directors to deny registration when it has been granted discretion to do so in the certificate of incorporation is the prohibition against the abusive exercise of legal rights found in Article 2, Paragraph II of the Swiss Civil Code. Legal commentators agree that such a prohibition is theoretically violated by the arbitrary refusal of a board of directors to register title shares, i.e., a refusal not objectively justified as being in the interests of the corporation. To date, however, there have been no known instances where a board of directors’ exercise of its discretion to deny registration under the so-called general clause has been challenged in court. It is also unclear whether an acquiror of title shares, as opposed to the selling shareholder, enjoys standing to challenge a discretionary denial of registration.

approval requirements proposed by Nestlé board of directors for takeover defense requirements not, as a practical matter, attainable). Cf. Kampf gegen die “ewige” Stimmrechtsbeschränkung bei Conti-Gummi, Handelsblatt, Feb. 26, 1990, no. 48 at 26 (lock-up provision adopted by West German Corporation, in 1989 to require approval of three-fourths voting share capital present at meeting where three-fourths of total share capital is represented for elimination of maximum voting limit; provision currently being challenged under West German law as impermissible “eternal barrier to change” to the detriment of future shareholders).

67 Judgment of the First Civil Division of March 21, 1950, 76 BGE II at 68 (permitting suit against corporation for fulfillment of legal duty to register insofar as registration not restricted under certificate of incorporation). See FORSTMOSER & MEIER-HAYOZ, supra note 31, § 39 at 267 n.19.

68 The question has yet to be decided by the Swiss Federal Tribunal. Cf. W. WUERZER, supra note 63, at 114 (no standing for acquiror); with F. BUERGI, supra note 40, art. 686 OR, comment 30 at 316 (acquiror should also have standing); FORSTMOSER & MEIER-HAYOZ, supra note 31, § 39 n. 19 at 267 (acquiror has legal claim to registration).

69 Schweizerisches Zivilgesetzbuch, vom 10. Dezember 1907 (SR 210) [hereinafter ZGB]. See FORSTMOSER & MEIER-HAYOZ, supra note 31. With regard to certain involuntary share transfers where a board must accompany such a registration denial with a purchase offer, see supra note 44.

70 See, e.g., Botschaft, supra note 29, § 211.21 at 80; U. BENZ, supra note 38, at 79. Cf. Judgment of the First Civil Division of March 21, 1950, 76 BGE II at 70 (benefit of doubt as to arbitrariness of registration decision to be given to board of directors).

71 The question was expressly left open by the First Civil Division of the Swiss Federal Tribunal in its Judgment of March 21, 1950, 76 BGE II at 69. No consensus exists with regard to this question among legal commentators. See W. WUERZER, supra note 63, at 114 (citing authorities).
The general lack of litigation in this area can be attributed to, among other things, the considerable difficulties in proving the arbitrariness of a board refusal of registration, especially with respect to a refusal without the naming of grounds therefore, under a general clause, and, more generally, the extreme reluctance of Swiss courts to interfere with internal corporate affairs. Legal commentators agree, however, that protection against the inner or outer infiltration of a corporation is a circumstance justifying a denial of registration, and the speculative purchase of stock by an investor has been singled out as an example of such inner infiltration.

2.2.2. Legal and practical effect of Vinkulierung

The Stock Corporation Act provides that only the holders of title shares registered as such in the corporate stock ledger may be regarded as title shareholders in relation to the corporation. In a series of rulings under this provision, the Swiss Federal Tribunal has held that an acquiring title shareholder, regardless of his eligibility for registration, is entitled to possession of the underlying title share certificate and, more importantly, to collect declared dividends and to exercise certain creditor-related rights with respect to the acquired title shares; conversely, all remaining rights attaching to title shares, particularly the rights to vote and to exercise preemptive shareholder rights, remain with the selling title shareholder until registration of the acquiring shareholder is effected. Thus, a corporation's failure to register a title

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72 See Botschaft, supra note 29, § 211.21 at 80 (objective grounds justifying a denial of registration may be easily manufactured during litigation). See also U. BENZ, supra note 38, at 79.

73 See FORSTMOSER & MEIER-HAYOZ, supra note 31, § 37 at 258 n.14. The impermissibility of contingent fee arrangements under Swiss law, the requirement that the losing party in a lawsuit bear the court and attorney fees of his opponent, and the requirement that shareholder plaintiffs provide an advance deposit, in many cases prohibitively high, to cover a corporation's fees in the case of ultimate defeat also play roles in deterring shareholder litigation. Cf., e.g., David gegen Goliath, supra note 32 (appeal to Federal Tribunal by Nestlé shareholder plaintiffs against Vevey Circuit Court's demand for advance deposit of half a million Swiss francs); Der Streit um die Nestlé-Kapitalerhöhung, NZZ, Mar. 14, 1990, no. 60 at 15 (foreign ed.) (deposit required to be made; shareholder plaintiffs chose wrong course of appeal).

74 See Meier-Schatz, supra note 31, at 115 n.91 (citing authorities).

75 Meier-Schatz, supra note 31, at 115 n.91; F. BUERGI, supra note 40, art. 686 OR, comment 23 at 315.

76 OR, art. 685, para. IV.

77 Judgment of the First Civil Division of June 11, 1957, 83 BGE II 297, 307-8 (financial rights transferred to new acquirer); Judgment of the First Civil Division of July 7, 1964, 90 BGE II 235, 239 (transferred financial rights limited to concrete creditor-related claims); Judgment of the First Civil Division of May 10, 1983, 109 BGE II 130, 137 (preemptive shareholder and voting rights remain with ledger share-
share transfer effectively converts the acquiring shareholder into a holder of non-voting stock with an ordinary, non-privileged dividend return. Voting, preemptive, and other corporate membership rights relating to the title shares may still be exercised by the selling shareholder, even though such a "ledger shareholder" no longer bears the financial risks normally borne by holders of voting stock.78

Although an unwanted acquiror could attempt to evade the force of Vinkulierung provisions through the use of so-called "straw men" — unobjectionable fiduciary purchasers of Swiss nationality — to apply for registration,79 the practically unlimited right of a corporation's board of directors to request documentation in support of a registration application represents a powerful tool both to delay the course of an attempted takeover and to investigate instances of suspected fiduciary relationships.80 Moreover, the concealment of a fiduciary relationship with respect to a title share registration application, as well as a registration attempt by an investor ineligible to be a title shareholder, is prohibited under the catch-all prohibition on the abusive exercise of legal rights found in Article 2, Paragraph II of the Swiss Civil Code.81

Current law provides no time frame for taking corporate action on a registration request; moreover, in connection with registration appli-
ocations made by title share acquirors, the board of directors may require the acquiror to provide any supporting documentation regarding the acquiror's identity, financial position, or any other information deemed relevant.\(^8\) On the other hand, a corporation may not under current law require the selling or acquiring title shareholder to apply to the corporation for registration of the transfer of title shares or otherwise report such transfers to the corporation.\(^8\) Under a convention on title share transfers adopted by the Swiss Bankers' Association (SBA) in 1961,\(^8\) member banks are required to report transfers of restricted title shares to signatory corporations and take steps to ensure that title share acquirors apply for registration to the issuer in accordance with relevant stock exchange recommendations.\(^8\)

Convention 61, however, is a mere gentlemen's agreement with no enforceable sanctions for the breach of its provisions,\(^8\) and its notification and registration provisions are often only loosely adhered to.\(^8\) Because of the lack of effective notification and registration application deadlines for title share transfers, and as a consequence of the increased absolute number of title shares restricted by Vinkulierung, a "gray market" has developed, both on and off Swiss stock markets, in the trade of essentially severed dividend rights to title shares, i.e., title shares that have been sold but not yet registered in the name of a new owner. Assuming the silent agreement of stock market participants not to report the first acquiror of restricted title shares to the relevant corporation for approval — or at least not for several months — dividend rights to such shares may be sold and resold many times over, independent of the voting and other rights relating to the shares, without the

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\(^8\) Arnold, supra note 32, at 42. The catch-all prohibition of ZGB, art. 2, para. II serves as a limit on the board's otherwise unlimited right to request documentation. Cf. supra note 69 and accompanying text.

\(^8\) See OR, art. 680, para. I (only duty which may be imposed on shareholders is duty to pay in full for subscribed shares). See also U. BENZ, supra note 38, at 56.

\(^8\) Uebereinkommen der Schweizerischen Bankiervereinigung betreffend Handlungsverweisung von vinkulierten Namenaktien bestimmter schweizerischen Gesellschaften [Convention of the Swiss Bankers' Association Regarding Transfers of Title Shares of Certain Swiss Corporations Subject to Vinkulierung], Apr. 6, 1961, confirmed by (be-stätigt durch) Circular No. 2901, Aug. 26, 1985, para. 3 (hereinafter Convention 61)). The SBA is a private organization whose membership includes the overwhelming majority of Swiss banks. See E. TILLMANN, supra note 26, at 55. Over 60 leading Swiss public corporations, on the other hand, have also agreed to cooperate with the provisions of Convention 61. Sind vinkulierte Namenaktien börsenfähig, supra note 46.

\(^8\) See, e.g., U. BENZ, supra note 38, at 127 (application for registration within 14 days after transfer effected required under § 18V of the Usanzen der Zürich Effektenbörse [Usages of the Zurich Stock Exchange]).

\(^8\) E. TILLMANN, supra note 26, at 55.

\(^8\) See Böckli, supra note 47, at 151.
knowledge of the issuing corporation. Alternatively, in many cases dozens of transfers will be effected, again without knowledge of the issuing corporation, during the weeks or even months which may pass before a board of directors ultimately approves or denies an acquiror's application for registration.

Estimates that as much as forty percent of Rinsoz & Ormond's issued title shares was voted by so-called ledger shareholders at a recent shareholders' meeting illustrate the breadth of the ever-increasing gray market trade in dividend rights to restricted title shares in Switzerland. Although several Swiss corporations have adopted certificate of incorporation provisions to the effect that no rights relating to title shares may be acquired without corporate approval, such provisions alone have had little impact on the extent of this gray market trade.

2.3. Preferred-Voting Title Shares

Under the Swiss Stock Corporation Act, the voting strength of Swiss shares is normally determined in accordance with par value. However, a Swiss stock corporation may, assuming the existence of authorization in the certificate of incorporation, adopt a "per share" voting system and issue title shares preferred as to voting strength over other issued shares by virtue of a lower par value. No limits apply under current law as to either maximum ratios of preferred-voting shares to ordinary shares or maximum allowable differences in respective par values.

Preferred-voting shares grant their holders voting strength disproportionate to required capital investment. Nonetheless, an issuance of

88 Bökli, id.; FORSTMOSER & MEIER-HAYOZ, supra note 31, § 39 at 268 n.20.
91 Bökli, supra note 47, at 151 n.15. See FORSTMOSER & MEIER-HAYOZ, supra note 31, § 39 at 269 n.24. Where a split in rights relating to title shares is prohibited under the certificate of incorporation and such title shares are embodied by couponless one-way share certificates, however, gray market trade in dividend rights may be effectively blocked. Bökli, supra note 47, at 151 n.16.
92 OR, art. 692, para. I.
93 OR, arts. 627, 1. 10, 693, paras. I, II. A Swiss stock corporation may not issue shares with the same par value but expressly varying as to voting strength, as is allowed under various U.S. state corporate laws. See Meier-Schatz, supra note 31, at 115; FORSTMOSER & MEIER-HAYOZ, supra note 31, § 20 at 157 n.27.
94 See Meier-Schatz, supra note 31, at 115. See also Botschaft, supra note 29, § 202.3 at 43 (under current practice, preferred-voting shares with 100 Sfr. par value and ordinary voting shares with 1000 Sfr. par value).
preferred-voting shares is ill-suited as a defensive measure in response to an ongoing takeover contest under current law. Because of the high standard of shareholder approval required for the issuance of preferred-voting rights through a recapitalization, the success of a board proposal for such an issuance is uncertain. Further, title shares held by shareholders dissenting or abstaining from a shareholder resolution which adopts preferred-voting shares—conceivably representing as much as one-third of a corporation's issued capital—are automatically freed from applicable transfer restrictions in the certificate of incorporation for a six-month period following the adoption of such a resolution. Thus, during the six-month Vinkulierung "escape period" following shareholder approval of a preferred-voting share issuance, a hostile acquirer could purchase title shares of dissenting or abstaining shareholders. This could be accomplished through an attractive public purchase offer as well as through secondary market purchases. The acquirer may require title share registration with respect to the acquired shares prior to expiration of the six-month period, notwithstanding any applicable Vinkulierung provisions that would normally bar such registration.

2.4. Voting Rights Limitations

In addition to restrictions on the transferability of title shares, the Swiss Stock Corporation Act further permits restrictions in the certificate of incorporation on an investor's ability to exercise voting rights, either directly or through representatives, with respect to issued shares—including bearer shares—exceeding a certain number or percentage of a corporation's issued share capital or a certain percentage of

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85 Under OR, art. 648, para. I, the issuance of preferred-voting shares through a recapitalization requires approval of at least two-thirds of a Swiss stock corporation's total issued voting share capital, a requirement typically difficult for Swiss public corporations to fulfill. See Botschaft, supra note 29, § 214.5 at 95.

86 See, e.g., Die "La Suisse" vollführt einen Rückzieher, NZZ, May 26, 1988, no. 120 at 33 (in face of strong resistance on part of Swiss media, shareholders, and deposit banks, "La Suisse" Insurance Company board forced to retract proposal for issuance of preferred-voting shares to Swiss Bank Corporation giving 40% voting power to such bank in exchange for 12.6% capital investment; Swiss Bank Corporation would have been required to refrain from exercising control with respect to the shares, but assured of 5.2 million Sfr. gain on later sale of shares).

87 OR, art. 648, para. II (six months following required publication of corporate resolution in Schweizerisches Handelsamtblatt (official publication of the Swiss Trade Office)).

the total shares represented at a shareholders' meeting.\textsuperscript{99} In the absence of certificate of incorporation provisions requiring a stricter approval threshold, a simple shareholder majority suffices for approval of such a voting right limitation.\textsuperscript{100} Voting rights attaching to shares in excess of a voting right limitation are suspended indefinitely.\textsuperscript{101} Typical levels for voting right limitations appear to range from three per cent to ten per cent of total issued share capital.\textsuperscript{102}

In the context of a hostile takeover attempt through purchases of bearer shares, voting right limitations — as opposed to limitations on the number or percentage of title shares registrable per investor — offer only limited protection to a Swiss target corporation. Although the circumvention of a voting right limitation through the transfer of shares is prohibited under Article 691, Paragraph 1 of the Swiss Stock Corporation Act,\textsuperscript{103} a corporation is nonetheless required to permit voting rights to be exercised by each person in possession of either a bearer share certificate\textsuperscript{104} or proof of deposit of a bearer share certificate, without inquiry into the particulars of the bearer's right to possession.\textsuperscript{105} Thus, despite the existence of an applicable voting right limitation, a would-be acquiror need only distribute the necessary number of bearer share certificates among various "straw men" prior to a shareholders' meeting in order to reach a desired voting result.\textsuperscript{106} A mandatory 20\% voting right limitation prescribed under the predecessor of the current Swiss Stock Corporation Act was eliminated during stock law revisions in 1936 precisely because the goal of the 20\% limitation — the frustration of undesirably large voting blocks — had proven to

\textsuperscript{99} Arts. 627 line 10, 692 para. II OR. See M. Brunner, \textit{id.} at 76.
\textsuperscript{100} Art. 703 OR. See Meier-Schatz, \textit{supra} note 31, at 116.
\textsuperscript{101} Forstmoser & Meier-Hayoz, \textit{supra} note 31, § 20 at 154 n. 15.
\textsuperscript{102} See, e.g., Weichere Vinkulierung von Nestle-Aktien, \textit{supra} note 23 (Nestlé voting right limitation of 3\%); Hero Jacobs: Nach dem "Takeover" das "Giveover", SHZ, Jan. 29, 1987, no. 5 at 21 (Hero Conserven 10\% voting right limitation); Ciba-Geigy vereinfacht die Kapitalstruktur, \textit{supra} note 46, (Ciba-Geigy 5\% voting right limitation).
\textsuperscript{103} Judgment of the First Civil Division of December 18, 1945, BGE 71 II 277, 280 (violation of Art. 691 OR when purpose of share transfer is not to effect property transfer but to allow recipient to exercise voting rights).
\textsuperscript{104} The statutes of many Swiss public corporations require that bearer share certificates be placed in deposit with an approved deposit bank a certain number of days prior to each shareholders' meeting. See A. Schett, \textit{Stellung und Aufgaben der Verwaltung einer AG bei der Durchführung der ordentlichen GV}, Reihe Handels- und Wirtschaftsrecht, vol. 9, 38 (1978).
\textsuperscript{105} Art. 689 IV OR. See N. Studer, \textit{Die Quasifusion} 47 (1974).
\textsuperscript{106} N. Studer, \textit{supra} note 105, at 54. See also M. Brunner, \textit{supra} note 98, at 76 (voting right limitations rely more on proper behavior and voluntary self-reporting of individual shareholders than on possibility of enforcement).
be easily circumventable.\textsuperscript{107} It appears, however, that a highly restrictive voting right limitation, requiring several hundred or thousand "straw men" in order to be circumvented, could effectively hinder control takeover attempts by unwanted investors.\textsuperscript{108}

2.5. Share Acquisition Barriers Facing Foreign Investors

2.5.1. Title share purchase barriers

Transfer restrictions on title shares through Vinkulierung represent without a doubt the most important and useful takeover defense tool currently available to a Swiss corporation.\textsuperscript{109} However, the effectiveness of Vinkulierung as a protection against unfriendly takeover is accidental.\textsuperscript{110}

The original impetus for the issuance of title shares by Swiss public corporations was the need to prove that such corporations were not under Nazi control. Certain Swiss public corporations relying on bearer shares as the predominant or exclusive corporate equity-financing instrument ran the danger of being placed on an "enemy list" maintained by Allied forces during World War II through their inability to identify controlling shareholders and offer proof of non-Nazi control.\textsuperscript{111} Thus, many Swiss public corporations introduced title shares during World War II and restricted ownership of such shares to Swiss investors,\textsuperscript{112} while others, including Nestlé, followed suit in the late 1940's and 1950's, concerned that it might once again become necessary to prove that control lay in Swiss hands.\textsuperscript{113}

\textsuperscript{107} E. Tillmann, supra note 26, at 117 (citing Art. 640 II of the Swiss Code of Obligations of March 30, 1911).
\textsuperscript{108} Cf. V. M. Gisler, Neuer Raider in der Wirtschaftsszene, Tages-Anzeiger, Sept. 13, 1988, no. 213 at 33 (restriction on exercise of voting rights with respect to shares exceeding .001% of Gewerbebank Baden's issued share capital)(holder of 45% of bank's issued share capital unable to defeat board proposal for stock split requiring two-thirds majority shareholder approval).
\textsuperscript{109} Meier-Schatz, supra note 31, at 106.
\textsuperscript{110} Title share restrictions have been included in the certificates of incorporation of many Swiss public corporations for well over thirty years, long before the first recent wave of hostile takeover attempts. Cf. M. Stehli, Aktionärschutz bei Fusionen 224 (1975)(first meaningful hostile takeover attempt against Swiss corporation in 1971).
\textsuperscript{111} See, e.g., M. Brunner, supra note 98, at 49-50; Vinkulierte Namensaktien: Kastrierte Titel, SHZ, Feb. 19, 1987, no. 8 at 14; Tribune: Zwang zur Vinkulierung?, SHZ, June 16, 1988, no. 24 at 57. As many as 1500 Swiss corporations and single-man firms were thus blacklisted. Id.
\textsuperscript{112} See e.g., Tribune: Zwang zur Vinkulierung?, supra note 111 (Sandoz AG, "Wintherthun" Insurance Company, Swiss Reinsurance Company); H. Schmid, supra note 40, at 13 & 91 n.92 (Ziba AG, Gebr. Sulzer AG).
\textsuperscript{113} See Vinkulierte Namensaktien: Kastrierte Titel, supra note 111.
The SBA adopted Convention 61 in 1961, following judicial rec-

ognition of a severance between dividend rights and voting rights relating to unregistered title shares, as insurance against the possibility that the nationality of a Swiss corporation in a future international conflict would be judged from the viewpoint not only of voting control but also of ownership of financial rights attaching to the issuer’s shares. Convention 61 operates in most cases to prevent non-Swiss investors, as an initial matter, from acquiring unregistered title shares subject to Vinkulierung. This result is achieved because Swiss title shares are rarely sold by banks or broker dealer firms which are not SBA members, and since under Convention 61 SBA members must pre-screen each purchase order for title shares subject to Vinkulierung and reject per se ineligible purchaser applicants, this in effect bars non-Swiss investors as they are normally per se ineligible.

Unregistered Swiss title shares nonetheless have been known to reach the hands of foreign investors, either through SBA members acting in disregard of the convention’s non-binding recommendations, through non-SBA traders, or pursuant to negotiated transactions. Although the mere holding of unregistered title shares does not alone represent an effective means of pressuring a corporation into eliminating or altering Vinkulierung provisions which prevent a foreign inves-

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114 Convention 61, supra note 84, at Introduction. But cf. Im Bankengeschäft herrschen noch idyllische Verhältnisse, Tages-Anzeiger, Dec. 16, 1988, No. 294 at 33 (interview with Dr. Markus Lusser, President of the Swiss National Bank) (A Swiss corporation wishing to take over a foreign corporation does not ask itself if its actions will endanger American or British characters) (“Wenn ein schweizerisches Unternehmen ein anderes im Ausland übernehmen will, fragt man sich auch nicht, ob man den britischen oder amerikanischen Charakter gefährdet”).

115 Convention 61, supra note 84, at ¶ 1 (non-Swiss purchasers are generally deemed per se ineligible for title share registration pursuant to provisions in the certificate of incorporation or board policy). Would-be purchasers are required to fill out an application form stating name, nationality and whether the shares are being purchased in a fiduciary capacity; the form is then checked against the Vinkulierung provisions and board policies of signatory issuing corporations, distributed to SBA members in the form of a periodically updated looseleaf notebook. U. BENZ, supra note 38, at 132.

116 See e.g., V. M. Gisler, Differenzen in der Bankiervereinigung, Tages-

Anzeiger, Dec. 9, 1988, no. 288 at 33 (sales of Swiss title shares to various ineligible foreign acquirors by five SBA members).

117 See e.g., Auslandsinteresse Surprise Baloise, NZZ, Jan. 23/24, 1988, no. 18 at 33 (unclear whether 13% parcel of Baloise-Holding title shares purchased by ineligible foreign investors acquired through SBA or non-SBA members).

118 See e.g., Vinkulierungswillkür bei “La Genevoise”, NZZ, Aug. 3, 1988, No. 178 at 27 (14% parcel of “La Genevoise” Insurance Company unregistered title shares sold in negotiated deal to ineligible West German insurance firm). The frequency with which foreign investors have been able to acquire Swiss title shares through the assistance of “straw men,” i.e., Swiss fiduciary purchasers willing to conceal on an SBA application form a foreign investor’s beneficial interest in the title shares to be acquired, is unclear.
tor's registration, such shareholdings may form part of a long-term waiting strategy, or may be coupled with substantial bearer share purchases and eventual attempts to alter or eliminate such provisions or policies through the calling of a special shareholders' meeting. On the other hand, the prospect of a foreign acquiror holding a significant number of a Swiss public corporation's unregistered title shares on a long-term basis may be sufficiently unsettling as to spur the corporation's board of directors into arranging for an acceptable third party to purchase the unregistered title share parcel.

2.5.2. Restrictions on acquisition of Swiss real estate

Pursuant to a Swiss federal law commonly referred to as Lex Friedrich, a foreign investor with a place of residence or incorporation outside of Switzerland is required to apply for and obtain a cantonal permit prior to the acquisition of Swiss real estate. The acquisition by a foreign investor of a controlling interest in a Swiss corporation, one-third or more of whose total assets consist of Swiss real estate, constitutes an "acquisition of real estate" within the meaning of Lex Friedrich and requires that a permit be obtained with respect to each piece of real estate owned by such a corporation. A controlling interest in a Swiss corporation is presumed to exist for purposes of Lex Friedrich in the event that one or more foreign investors, taken together, are either able to exercise more than one-third of the aggregate voting rights, or possess more than one-third of the company's total issued shares and PS capital. Cantonal authorities may

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119 See e.g., Vinkulirungswilkur bei "La Genevoise", supra note 118 (purchase of 13% "La Genevoise" unregistered title shares by West German insurance firm possibly part of build-up of strategic long-term waiting position).

120 See e.g., infra note 128.

121 Federal Act of December 16, 1983, Regarding the Acquisition of Real Estate by Persons Outside Switzerland (Bundesgesetz vom 16. Dezember 1983 über den Erwerb von Grundstücken durch Personen im Ausland [SR 211.412.41]) [hereinafter BEwG]). This law is accompanied by federal regulations. See Regulations of October 1, 1984, Regarding the Acquisition of Real Estate by Persons Outside Switzerland (Verordnung vom 1. Oktober 1984, über den Erwerb von Grundstücken durch Personen im Ausland [SR 211.412.411]) [hereinafter BEwV]).

122 BEwG, arts. 2, 5.

123 BEwG, art. 4, ¶ I, § d. For purposes of this section, a corporation's "total assets" are required to be measured in accordance with actual rather than disclosed value. Id.

124 BEwG, art. 6, ¶ II, §§ a, b. While acquisitions by a foreign investor of bearer shares are thus required to be included in calculations of a "controlling interest" in a Swiss corporation, as a practical matter, such acquisitions will escape notice insofar as Swiss public corporations are normally unaware of the identity of bearer shareholders. See A. BRUESCH, Aufdeckung und Verfolgung von Umgehungsgeschäften, in DAS BUNDESGESETZ ÜBER DEN ERWERB VON GRUNDSTUECKEN DURCH PERSONEN IM
grant permits only in certain restricted situations, pursuant to federal law and regulations, and investors who obtain or use Swiss real estate parcels in violation or circumvention of Lex Friedrich may, among other things, find themselves required to sell the real estate at a public auction under a court order.125

The level of investment in Swiss real estate by Swiss public corporations is typically high, and the possible application of Lex Friedrich must therefore be taken into consideration by foreign investors contemplating a control takeover attempt against a Swiss target corporation. In extreme cases, where the value of the Swiss target corporation’s real estate investments approaches one-third of its total assets, the real estate permit requirements of Lex Friedrich will effectively protect that corporation against the threat of foreign takeovers.126 Because accurate figures regarding the actual value of real estate investments held by a Swiss public corporation in relation to the actual value of its assets will typically not be disclosed either to foreign investors or to corporate shareholders,127 uncertainty as to the possible application of Lex Friedrich is created. This uncertainty provides a Swiss public corporation’s board with an unverifiable ground for opposition to a control takeover attempt that may involve foreign investors, a ground for opposition whose importance may increase if certain proposed revisions to the Stock Corporation Act are ultimately adopted.128


125 BewG, ch. 3, arts. 8-14 & 27 ¶ 2; BewV, ch. 2, arts. 3-14; See Judgment of the Second Public Law Division of March 25, 1988, BGE 114 Ib 11, 15 (revocation of real estate permit under BewG, art. 25, ¶ I; use of land not contemplated under permit).

126 Cf. Arnold, supra note 32, at 43 (“there is no need to say that a foreign raider will not get . . . a permit for acquiring a Swiss corporation [that is viewed as an ‘acquisition of real estate’ under Lex Friedrich’]).

127 See generally infra notes 249-67 and accompanying text. Cf. W. KUPPER, STILLE RESERVEN UND AKTIONÄRSINTERESSEN 3 (1967) (investments consisting of millions of square meters of real estate booked in balance sheets of certain Swiss public corporations at pro-memoria value of 1 Sfr.).

128 See infra note 188 and accompanying text. Cf. V. C. Büchi, Scheiterte “La-Suisse”-Übernahme durch Tettamenti an Lex Friedrich?, Tages-Anzeiger, Aug. 10, 1988, no. 184 at 31 (“La Suisse” board’s refusal to register hostile bidder based on lurking uncertainty as to existence of foreign investors and possible application of Lex Friedrich); Surprise Baloise, supra note 117 (acquisition of 25% packet of unregistered title shares of Basel holding company from foreign investors necessary to avoid possible application of Lex Friedrich).
PROTECTION AGAINST HOSTILE TAKEOVER

3. Effectiveness of Available Takeover Defenses in Recent Takeover Contests

3.1. Post-Issuance Vinkulierung

The concept of Vinkulierung for Swiss public corporations has evolved in recent years into an approval device chiefly employed to immunize a target corporation’s board of directors against the threat of an unfriendly takeover posed by an investor, regardless of the investor’s country of origin or incorporation. Actual attempts by various investors in the recent past to acquire voting control of Swiss public corporations, including corporations without issued title shares subject to Vinkulierung, have been, although often profitable, almost uniformly unsuccessful. These attempts have been unsuccessful in large part because of the wide array of post-issuance Vinkulierung measures available to a target corporation under the Swiss Stock Corporation Act.

One such measure, for example, is the total or partial conversion of bearer shares into title shares through a stock split and the imposition of Vinkulierung on such title shares. Necessary shareholder approval for these partial conversions has even been obtained subsequent to the launching of takeover attempts against several Swiss target corporations with issued share capital consisting exclusively of bearer shares. Swiss target corporations under siege by unwanted acquirors have also effected complete conversions of bearer shares into title shares that are subject to Vinkulierung. This represents a more drastic measure to prevent a control takeover in light of its impact on the equity-

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129 See W. Schluep, Lauterkeitsrechtliche Aspekte des “Unfriendly Takeovers”, 60 SAG 89, 93 (1988)(true motive of post-issuance Vinkulierung is often protection of management against its forced replacement through new majority shareholders).

130 Shareholder voting mechanisms and corporate disclosure policies contributing to the adoption of target corporation defense strategies are discussed generally infra notes 196-272 and accompanying text.

131 Such a conversion necessitates shareholder approval of a provision in the certificate of incorporation authorizing conversions generally (Art. 627 line 7 OR), as well as of the specific conversion and the Vinkulierung provisions, each of which actions currently requires a simple shareholder majority in the absence of stricter approval requirements in the certificate of incorporation. Art. 703 OR.

132 See, e.g., Grossaufmarsch von Hero-Aktionären an der GV, NZZ, Apr. 24, 1985, no. 95 at 18 (split of each Hero AG bearer share into one bearer share and two title shares subject to Vinkulierung in response to acquisition of 25% of issued bearer shares by Saudi-Arabian investors); Gewerbebank Baden in ruhigerem Fahrwasser, NZZ, Feb. 17, 1989, no. 40 at 33 (split of each bearer share into one bearer share and two title shares approved at special shareholders' meeting of Gewerbebank Baden AG in response to surprise acquisition of 47% bearer share parcel by unwanted investor; sufficient shareholder approval obtained only as result of unusual voting right limitation).
financing potential of the target corporation. Because bearer shareholders are likely to balk at trading-in their bearer shares for restricted title shares, which typically have lower stock market prices, board proposals for conversions of bearer shares into restricted title shares have often been accompanied by proposals for the issuance of "loyalty premiums" to shareholders in the form of rights to subscribe to new PS or bearer share issuances at attractive prices.

Another form of post-issuance Vinkulierung for preventing a control takeover by an unwanted investor is the imposition or temporary reduction of limits on the maximum amount of title shares which may be registered with respect to any one investor or investor group. Such a reduction may be achieved by amending the certificate of incorporation or, if the board of directors has already been granted discretion to adjust registrable title share limits, can be put in place quickly during a control takeover contest, without seeking shareholder approval. Because the prohibition on the retroactive application of post-issuance Vinkulierung measures arguably does not extend to pending title share registration applicants, newly-reduced limits on registrable title shares

138 See, e.g., Das Abwehrdispositiv der Solothurner Handelsbank, NZZ, Sept. 24/25, 1988, no. 223 at 39 (complete conversion of Solothurner Handelsbank bearer shares into title shares subject to Vinkulierung adopted in response to market purchases of 20% of issued bearer shares by unknown acquiror); Verteidigungswillige Hero-Aktionäre, NZZ, Mar. 11, 1987, no. 58 at 19 (complete conversion of Hero AG bearer shares [those remaining after 1985 stock split] into restricted title shares; prompted by acquisition of 31% of issued share capital by Hero rival Jacobs Suchard).

139 Cf. Hero/Jacobs: Nach dem "Takeover" das "Giveover", supra note 102 at 21, 22 (drastic price drop in Hero bearer shares subsequent to notice of board proposals for complete conversion of bearer shares into title shares subject to Vinkulierung).

140 See, e.g., Grossaufmarsch von Hero-Aktionaren an der GV, supra note 132 (partial conversion of Hero bearer shares coupled with 5 million Sfr. issuance of bearer shares to existing shareholders at par value); Klare Holdingstruktur für die Publicitas, NZZ, June 1, 1988, no. 125 at 34 (1987 split of each Publicitas AG bearer share into one bearer share and two title shares subject to Vinkulierung accompanied by compensatory issuance of PS with preemptive rights); Verteidigungswillige Hero-Aktionäre, supra note 133 (complete conversion of Hero bearer shares accompanied by issuance of PS with attractive preemptive rights).

141 See, e.g., "La Genevoise" nur für Genfer, supra note 80 (special shareholders' meeting to reduce title share registration limit from 1,450 to 200 shares per investor); Das Abwehrdispositiv der Solothurner Handelsbank, supra note 133 (special shareholders' meeting to impose registration limit of 1,000 title shares per investor).

142 See, e.g., Umfangreiche Privatplacierung der Bank Leu, NZZ, Nov. 18, 1988, no. 270 at 33 (board-imposed limit on registrable title shares of Bank Leu AG reduced from 5% to 1% of title share capital shortly prior to private placement of reserve stock for purposes of securing control); Surprise Baloise, supra note 117 (board-imposed limit on number of registrable title shares of Baloise Holding reduced from 8,000 to 1,000 shares in response to title share acquisitions by unknown foreign investors); Hero Conserven: Frische Konfis tur aus Lenzburg, SHZ, Feb. 26, 1987, no. 9 at 21 (total 100,000 issued Hero shares; limit on number of registrable title shares temporarily reduced to 400 subsequent to bearer share purchases by unwanted acquiror).
have provided much-needed grounds for denial of pending applications of unwanted title share acquirors. Conversely, when a board of directors has discretion to allow exceptions to a limit in the certificate of incorporation on the maximum amount of registrable title shares, it has proven to be an effective means of allowing a friendly acquiror to secure control during a takeover contest.

A third form of post-issuance Vinkulierung used as a defensive measure is the issuance of title shares and/or bearer shares to an acceptable third party who would be subject to the following limitations: the title shares would be restricted through post-issuance Vinkulierung; any applicable preemptive shareholder rights would be excluded; and the third party would be required to refrain from exercising control with respect to the shares pursuant to a standstill agreement. A private reissuance of "reserve" shares, including restricted title shares, represents an especially effective method of warding off the threat of a hostile takeover because, absent certificate of incorporation provisions to the contrary, a reissuance of reserve shares does not require either shareholder approval or the granting of preemptive rights. Such a

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188 See, e.g., Georg Fischer AG, Schaffhausen: Informationsarme Informationen, SHZ, Apr. 30, 1987, no. 18 at 27 (limit on number of registrable title shares of Georg Fischer AG reduced by board from 10,000 to 2,000 in response to perceived takeover attempt; pending applicants informed amounts exceeding limit would not be registered); Kampf um Sulzer-Eintragungspraxis: Das Syndikat wird ungeduldig!, SHZ, Feb. 18, 1988, no. 7 at 7 (limit on number of registrable title shares reduced by Sulzer board from 3,000 to 1,000 during hostile takeover contest); Rückzug ins Rédut?, supra note 7 (reduced Sulzer title share registration limit applied to pending registration applicants).

189 See, e.g., Rechtfertigungsversuche bei der "La Suisse", NZZ, Aug. 10, 1988, no. 184 at 29 (charter amendment reducing amount of "La Suisse" registrable title shares from 5% to 2% of title share capital, with board-retained discretion to permit exceptions; provision crucial in ensuring success of subsequent white knight tender offer). The Swiss Federal Tribunal is currently examining whether a board of directors may issue "treasury" title shares to a Swiss deposit bank, for the purpose of satisfying title share options to be exercised in the future by debenture holders, where the deposit bank could vote such shares in favor of management proposals without regard to an otherwise applicable statutory restriction on registrable title shares. See Streit Nestlé-Canes vor Bundesgericht, NZZ, Aug. 26-27, 1989, no. 197 at 34; Der Streit um die Nestlé-Kapitalerhöhung, supra note 73.

190 See, e.g., Gegenangriff der Rinsoz & Ormond, NZZ, Nov. 8, 1988, no. 261 at 34 (special shareholders' meeting of Rinsoz & Ormond, a Vevey-based tobacco firm, for approval of share issuance, excluding preemptive rights, to a Swiss investor group for purposes of securing control; issuance would reduce percentage of Rinsoz & Ormond share capital held by partially unknown investors from 40% to 30%); Gewaherte Eigenständigkeit der Rinsoz & Ormond, NZZ, May 13/14, 1989, No. 109 at 39; Cf. Partizipationsscheine: Schutz oder Chance?, SHZ, Nov. 10, 1988, no. 45 at 19 (private placement for purpose of securing control represents merely short-term solution; fails to address underlying problem of undervalued stock).

191 See, e.g., Umfangreiche Privatplacierung der Bank Leu, supra note 137 (private placement by Bank Leu AG to investor group of reserve stock consisting of 90,000...
measure presupposes that the reissued title shares are already subject to Vinkulierung and that the target corporation has sufficient surplus capital and/or surplus reserves on hand to repurchase enough of its own shares to dilute the shareholdings of the unwanted acquiror.\footnote{142}

3.2. White Squire and White Knight Arrangements

In the event that Vinkulierung-related measures fail to dilute or weaken sufficiently a would-be acquiror’s position, a Swiss target corporation’s board of directors may choose to rid itself of the unwanted investor by arranging for a “white squire” to purchase the threatening share package. The target corporation obtains a standstill agreement from the white squire in exchange for, among other things, its agreement to register the white squire as title shareholder.\footnote{143}

For a Swiss target corporation, a white squire purchase arrangement is preferable to a traditional “greenmail” corporate repurchase of an unwanted acquiror’s stock for several reasons. First, a corporate repurchase would require the target corporation to have on hand sufficient surplus capital and/or reserves to purchase the typically expensive share packages of unwanted acquirors.\footnote{144} Second, while the votes attaching to repurchased shares are suspended until the shares are reissued by a corporation, with white squire purchases, these votes may be effectively exercised by the corporation’s board pursuant to a standstill agreement.\footnote{145}

restricted title shares and bearer shares, representing 20% of total issued share capital, in response to heavy market purchases of bank’s title shares by unknown acquirors; terms of standstill agreement not publicized).

\footnote{142} It is not altogether free from doubt that corporate repurchases for the purpose of defending against control takeovers are permissible. \textit{See supra} note 34.

\footnote{143} \textit{See}, e.g., \textit{Temporär erhöhte Beteiligung des SBV an der Basler-Versicherungsgruppe}, \textit{NZZ}, Mar. 3, 1988, No. 52 at 33 (13% of Bâloise-Holding issued share capital purchased from unidentified foreign investor group by Swiss Bank Corporation; title shareholdings of bank registered pursuant to board-granted exception to registrable title share limit; under standstill agreement, bank forbidden from exercise of control and required to sell shares within next three years to board-approved purchasers); \textit{Gewerbebank Baden in ruhigerem Fahrwasser}, \textit{supra} note 132 (47% of Gewerbebank Baden issued share capital purchased by BBC Brown Boveri AG from unwanted investor; BBC participation to be gradually reduced pursuant to sales to board-approved purchasers).

\footnote{144} \textit{Cf}, e.g., \textit{Gewerbebank Baden in ruhigerem Fahrwasser}, \textit{supra} note 132 (profit from sale by unwanted acquiror of Gewerbebank Baden share package to white squire of between 25 and 30 million Sfr.). Furthermore, the legality of corporate repurchases for takeover defense purposes under current law is not entirely free from doubt. \textit{See supra} note 34.

\footnote{145} \textit{See supra} note 143. \textit{See also Rey schliesst Sulzer fester in die Arme}, \textit{NZZ}, Apr. 5, 1989, no. 78 at 33 (investor Werner Rey required under standstill agreement to support politics and proposals of Sulzer AG for a period of six years in return for registration of title shares purchased from unwanted investor representing 20% of Sul-
On the other hand, white squire arrangements pose the danger that the new “senior partner” will develop her own ideas and replace the management that called her in, assuming the white squire purchaser is neither required to reduce nor prohibited from increasing her shareholdings under the terms of the relevant standstill agreement. Although a Swiss corporation may prevent this from happening through a management buy-out of an unwanted acquirer’s shares and registration of the acquired shares directly in the names of corporate management, such an arrangement is not desirable because of both the need to mortgage corporate assets to obtain necessary capital to buy out the unwanted investor, and the existence of possible tax disadvantages under Swiss law.

Would-be acquirors are not prevented through Vinkulierung from making public tender offers for restricted title shares. Such tender offers are of necessity, however, either made contingent on board assurances of title share registration or, assuming the bidder’s share ownership is sufficient to demand the calling of a shareholder’s meeting, on the elimination of Vinkulierung policies or provisions in the certificate of incorporation preventing the bidder’s registration. In the first instance, the target corporation’s announcement of its intent not to register title shares acquired by the hostile bidder will usually be enough to defeat the hostile takeover attempt. In the second instance, the ability

\[ \text{zer} = \text{issued share capital}. \]

146 Cf., e.g., Rey schliesst Sulzer fester in die Arme, supra note 145 (acquisition of additional 10% of Sulzer title shares by Werner Rey one year after “white squire” purchases amounting to 20%; current 30% ownership by Rey renders standstill agreement undertakings to support board policies and proposals for next five years illusory); Sulzer etwas schwach auf der Eigenkapitalbrust, Tages-Anzeiger, Apr. 25, 1989, no. 95 at 34 (Sulzer board proposal to elect Rey as director).

147 See, e.g., Hero-Conserven: Frische Konfitüre aus Lenzburg, supra note 137 (31% Hero title share packet acquired from unwanted Swiss investor by top members of Hero management in first large-scale management buy-out in Switzerland).

148 See, e.g., Tschäni, Lohnen sich Management-Buy-Outs?, SHZ, Sept. 22, 1988, no. 38 at 15 (tax disadvantages especially significant in case involving the buy-out of foreign investor shareholdings).

149 See, e.g., Rechtfertigungsversuche bei der “La Suisse”, supra note 139 (August 1988 hostile tender offer for “La Suisse” shares more than four times above December 1987 stock market prices); Rinsoz & Ormond vehement gegen die Denner-Offerte, NZZ, May 7-8, 1988, no. 106 at 41 (hostile tender offer for Rinsoz & Ormond shares more than two times the price of shares to be issued in private placement for purposes of securing control).

150 See infra note 197 and accompanying text.

151 See, e.g., Rinsoz & Ormond vehement gegen die Denner-Offerte, supra note 149, at 41 (registration of contingent tender offer bidder Denner AG vehemently rejected by board of Rinsoz & Ormond); Übernahme Poker auch um Warteck, Tages-Anzeiger, Sept. 12, 1988, no. 212 at 33 (the possibility of registering title shares acquired pursuant to the contingent tender offer was rejected by the Warteck board).
of a hostile bidder to eliminate or alter restrictive Vinkulierung provisions through the avenue of a special shareholders’ meeting may be effectively blocked through the existence of Vinkulierung lock-up provisions.\footnote{An increasing number of Swiss public corporations have in recent months adopted Vinkulierung lock-up provisions, the elimination of which under current law requires the approval of two-thirds of the total issued voting shares. See supra notes 64-66 and accompanying text.}

Alternatively, in the absence of Vinkulierung lock-up provisions, or in the event that a contingent offer appears attractive enough to lure a sufficient number of shareholders either into voting to eliminate Vinkulierung provisions at a special shareholders’ meeting, or into taking action themselves to demand a special shareholders’ meeting for this purpose,\footnote{But see \textit{Den Aktionärsblues hoch gesungen und dabei froh gezecht}, supra note 21 (blaming certain Swiss shareholding voting mechanisms in part for the failure of “La Suisse” shareholders to call a special meeting to adopt a resolution requiring title share registration of hostile bidder with the two-thirds shareholder approval required under the certificate of incorporation for alteration of Vinkulierung provisions). See generally infra notes 196-272 and accompanying text.} then a Swiss target corporation’s board of directors may announce its willingness to supply an acceptable buyer for shareholders wishing to sell their shares.\footnote{See, e.g., Konsum Verein Zürich lehnt neues Coop-Angebot ab, Tages-Anzeiger, May 29, 1989, No. 121 at 35 (Konsum Verein Zürich (KVZ) board opposition to second, higher tender offer of Coop Schweiz for KVZ shares; KVZ willing to supply acceptable buyer for KVZ shareholders desiring to sell shares).} In extreme cases, the target corporation’s board of directors may even arrange for an acceptable “white knight” to enter the bidding, agreeing to acknowledge the white knight bidder as title shareholder. A target board’s promise of registration of a white knight in such instances may force the target’s shareholders to content themselves with a bid substantially lower than that offered by the hostile bidder.\footnote{See, e.g., Eintragungsbegehren Tettamantis abgelehnt, \textit{NZZ}, Aug. 9, 1988, No. 183 at 25 (hostile bidder’s tender offer for “La Suisse” title shares was identical to the white knight’s competing tender offer except that it offered 2,000 Sfr. per share more; board assurances of registration were given to white knight but withheld from hostile bidder; the hostile tender offer was ultimately withdrawn in light of probable failure); \textit{Rechtfertigungsversuche bei der “La Suisse”,} supra note 139 (statement of “La Suisse” general director) (shareholders should be content with comparatively lower profit resulting from acceptance of white knight bid).}

4. Takeover Defenses Under Proposed Revisions to Swiss Stock Corporation Act

4.1. Regulation of Vinkulierung

Efforts to revise the Swiss Stock Corporation Act have been under-
way for over twenty years. The Swiss Senate and House of Representatives are currently in substantial agreement with the Swiss Federal Council upon many areas of the revised Stock Corporation Act. However, recent events, including the recent wave of hostile takeover attempts and Nestlé’s decision to allow its title shares to be acquired by foreign investors, have subjected the scope of Vinkulierung to close re-examination. At the forefront of current discussion is, among other things, whether the new law should expressly countenance the refusal of title share registration on the basis of foreign citizenship as well as whether it is appropriate to allow title shares subject to Vinkulierung to be listed on Swiss stock exchanges.

4.1.1. Federal Council proposals

According to the 1983 draft proposals for a revised Stock Corporation Act of the Swiss Federal Council, Swiss public corporations could deny the registration of title share transfers, first, when an “important ground,” expressly listed in the corporation’s certificate of incorporation, was implicated. Even when not expressly listed in a corporation’s certificate of incorporation, the goals of competition or maintaining the “Swiss character of the corporation” would in themselves be deemed by law as sufficient grounds to justify such a denial of
registration. Second, if granted the discretion to do so in the certificate of incorporation under a general clause, the board of directors of a public corporation could refuse the registration of title share transfers without stating its reasons on the condition that the corporation offered to purchase the title shares in question. The price of the shares would be based on their stock market value at the time of the registration attempt.

Under the Federal Council proposals, all rights to title shares subject to Vinkulierung would remain with a selling shareholder until the issuing corporation had granted its approval for the transfer, after which all rights to the shares would be transferred to the acquiror. The corporation's failure to deny registration within three months after receipt of an acquiror's registration application would be deemed to constitute approval of the application, resulting in the immediate transfer of all rights to the shares to the acquiror. On the other hand, should the issuing corporation deny the transfer request within the three month time period, to the extent such denial was not based on an "important ground," the corporation would then be obliged to purchase the title shares in question from the selling shareholder. Arguably, a selling shareholder could determine in advance, from the relevant article of the Stock Corporation Act or the certificate of incorporation, whether or not a particular prospective acquiror would be ineligible for registration based on an important denial ground. Nonetheless, the three month waiting period would arguably create an undesirable degree of uncertainty with respect to all title share trades, in particular with respect to anonymous trades effected over Swiss securities markets. Because of the difficulties associated with undoing a stock market transaction, even only a few days after its execution, the approval waiting period proposed by the Federal Council has been strongly criticised as unworkable with respect to listed title shares of public corporations.

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163 Botschaft, supra note 29, art. 685 ¶ 2, lines 1 & 2, at 229. Cf. Böckli, supra note 47, at 155-56 (criticizing legal presumption of the importance of denial based on nationality or incorporation as de jure discrimination against foreign investors).

164 Botschaft, supra note 29, art. 685b ¶ 1, 4 at 229.

165 Id., at art. 685c ¶ 1 at 230. Cf. NaRE 1985, supra note 161, at art. 685c ¶ 1 (provides for the same as Botschaft, but only in the absence of certificate of incorporation provisions to the contrary). Prior to a corporation's decision as to registration, a selling shareholder would be able to both collect dividends and vote with respect to the title shares in question.

166 Botschaft, supra note 29, art. 685c ¶ 3 at 230.

167 Id., art. 685b, ¶ 1 at 229.

168 Böckli, supra note 47, at 153. "Important grounds" would consist exclusively of grounds specified in a corporation's certificate of incorporation or presumed sufficient by law.

169 See, e.g., Aktienrechtsreform: Eine (fast) verpasste Chance?, SHZ, Sept. 15,
4.1.2. Senate Proposals

As a result of objections raised by stock market participants, among others, to the revision proposals of the Swiss Federal Council and subsequently, by the House of Representatives, draft Stock Corporation Act revisions adopted by the Senate in 1988 contain special rules applicable to the acquisition, on a Swiss stock exchange, of title shares subject to Vinkulierung.

First, the Senate proposals would provide that all rights to restricted title shares acquired over a stock exchange would, in theory, be transferred immediately to the acquiror. Nonetheless, the acquiror would not be permitted to exercise any of the transferred rights, including the right to declared dividends, until acknowledged by the corporation as the title shareholder. The Senate proposals also provide mandatory time periods applicable to each step in the registration process for title shares. Banks effecting restricted title share trades over a stock exchange would be required to report the trades immediately to the issuing corporation, acquirors would be required to apply for registration within 15 days after such trades, and the issuing corporation would be required to deny or grant registration within 20 days after a registration request. Second, refusing to register title shares acquired over a stock exchange would be permissible under the proposals only if pursuant to provisions in the certificate of incorporation requiring refusals based on the nationality of the title shares acquiror; if the limitations in the certificate of incorporation on the maximum percentage or number of registrable title shares were exceeded; or if the acquiror had failed to apply for title share registration within a legally-prescribed period. Rights to dividends declared by an issuer, suspended because of a permissible registration denial, would extinguish one year after becoming due and would be payable if the denied acquiror has not first succeeded in reselling the title shares to another acquiring party eligible for regis-


Resolution of the Swiss Senate of September 26, 1988 (Beschluss des Ständerates vom 26. September 1988 [hereinafter StRE 1988]).

Id. at art. 685f, ¶ 1. Cf. Böckli, supra note 47, at 154 (labelling Senate formulation a “normative euphemism” but necessary with respect to stock market transactions). Thus, although a denied acquiror had paid the full price for title shares, upon denial of registration in permitted instances, the acquiror would be permanently prevented from exercising rights relating to such shares and would thereby be forced to recoup his financial outlay through a “forced sale” to a third party, inevitably resulting in a financial loss for the denied acquiror. Id.

Id at art. 685e, ¶ 11, 12.
For all other registration denials of title share transfers effected over Swiss stock exchanges, such as those based on a general clause, a public corporation would have to couple the denials with an offer to repurchase the title shares for the higher of either the stock market price at the time of the denial, or the original purchase price, plus interest and costs. For title shares of public corporations not traded on Swiss stock exchanges, a stock corporation would be allowed, as under the proposals of the Federal Council and the House of Representatives, to deny registration based on an "important ground" specified in the certificate of incorporation, such as staying within the corporate purpose, maintaining the economic independence of the corporation or, finally, maintaining the composition of the shareholder constituency. In the absence of such an "important ground," the corporation could deny registration by accompanying the denial with an offer by either the corporation, a shareholder or a third party to acquire the title shares in question based on the stock market value at the time of the registration application. Ownership of all rights to title shares acquired other than over a Swiss stock exchange would, as under the Federal Council proposals, remain with the seller, effectively requiring the undoing of the relevant acquisition transaction in the event of a denial based on an "important ground."

4.1.3. House of Representatives proposals

In September 1990, as part of the Swiss legislative enactment process, the Swiss House of Representatives addressed the differences between...
between its 1985 proposed revisions to the Stock Corporation Act pertaining to Vinkulierung and those proposed by the Swiss Senate in 1988.178

The House of Representatives resolved, first, that stricter Vinkulierung rules should apply to all acquisitions of restricted title shares listed on a securities exchange, regardless of whether the particular trade was effected privately or over a securities exchange.179 Second, because banks would normally not play a role in private acquisitions of restricted title shares, the House of Representatives voted further to drop the requirement that banks effecting trades in registered title shares be required to report such trades to the issuing corporation.180

Next, the House of Representatives concluded that a public corporation’s refusal to register restricted title shares would be permissible only if 1) provisions in the certificate of incorporation on the maximum percentage of number of registrable title shares were exceeded (as under the Senate proposals), or 2) such refusal were based on a certificate of incorporation provision allowing a corporation to refuse to register persons or entities as title shareholders if doing so could prevent the corporation from being able to produce “certain legally-required proof.”181 The most obvious application of the latter, somewhat oblique Vinkulierung ground would be in the context of Lex Friedrich, so that a Swiss public corporation could refuse to register a non-Swiss investor as title shareholder based on its view that the corporation might not otherwise be able to satisfy the Swiss nationality requirements governing Swiss real estate ownership prescribed by Lex Friedrich.182

With respect to the Vinkulierung of title shares of non-public corporations, the House of Representatives resolved to eliminate the so-called “escape clause” which allows non-public corporations to refuse registration of undesirable title share acquirors even if the refusal was not authorized by an “important ground” listed in the certificate of incorporation, providing the corporation itself purchased the title shares in question.183 It was argued that such an escape clause would have

178 Unless otherwise noted below, the House of Representatives made no changes to the regulation of Vinkulierung adopted under NaRE 1985. See supra notes 161-169 and accompanying text.

179 See Differenzbereinigung beim Aktienrecht. NZZ, Sept. 18, 1990, no. 216 at 25, 26. The questions of whether trades effected before and after official securities exchange hours would be viewed as being “effected over a securities exchange” was thus rendered moot.

180 Id. at 26.

181 Id.

182 See supra notes 123-128 and accompanying text. During the parliamentary debate, this provision was criticized as concealed discrimination against non-Swiss entities incompatible with the European Community’s prohibition on nationality-based discrimination. Differenzbereinigung beim Aktienrecht, supra note 179, at 26.
encouraged stock market manipulators to seek quick, short-term profits at the expense of the corporation.\(^\text{184}\)

4.2. Other Revision Proposals Affecting Takeover Defenses

Other aspects of the Stock Corporation Act revision proposals, which do not deal directly with the scope or impact of Vinkulierung, would also affect the conduct of hostile takeovers under future law. Legislative revision proposals would, for example, render the adoption of post-issuance Vinkulierung during the course of an ongoing takeover contest much more difficult, requiring the approval of two-thirds of all represented voting shares,\(^\text{185}\) together with a simple majority of the total par value of represented voting shares. Further, while lock-up provisions, including those applicable to Vinkulierung and voting right limitations, would continue to be allowed under the revision proposals, the automatic “double lock-up provision” of current law would be eliminated.\(^\text{186}\) In addition, under the Senate proposals a lock-up provision could only be adopted by the same supermajority shareholder approval required under the lock-up provision itself.\(^\text{187}\)

The revision proposals would, moreover, arguably affect a public corporation’s ability to rid itself of an unwanted acquiror by placing a ceiling of 20% of the corporation’s issued share capital on the maximum amount of title shares which could be repurchased, as an alternative to registration, in the case of a denial not based on a standardized or otherwise authorized Vinkulierung ground.\(^\text{188}\) An even lower ceiling of 10% of issued share capital would be placed on corporate repurchases in all other situations, including repurchases for defensive purposes.\(^\text{189}\) A corporation’s ability to effect a private placement issuance to

\(^{184}\) Id.

\(^{185}\) Botschaft, supra note 29, art. 704, ¶ 1, line 3, at 237; NaRE 1985, supra note 161, at art. 704, ¶ 1, line 3; StRE 1988, supra note 170, at art. 704, ¶ 1, line 3.

\(^{186}\) Cf. supra note 65 and accompanying text. A simple shareholder majority (art. 701 OR) would be required to eliminate Vinkulierung lock-up provisions in the absence of stricter approval requirements in the certificate of incorporation, rather than the approval of two-thirds of the total issued share capital currently required under art. 648, ¶ 1 OR.

\(^{187}\) StRE 1988, supra note 170, at art. 704, ¶ 1b.

\(^{188}\) Botschaft, supra note 28, art. 659 ¶ 2, at 220; NaRE 1985, supra note 161, art 659, ¶ 2; StRE 1988, supra note 170, art 659, ¶ 2.

\(^{189}\) Thus, doubts as to the permissibility of repurchases for defensive purposes under current law would be put to rest. Botschaft, supra note 29, art. 659, ¶ 1, at 220; NaRE 1985, supra note 161, art. 659, ¶ 1; StRE 1988, supra note 170, art. 659, ¶ 1. See Meier-Schatz, supra note 31, at 117, 118. As a practical matter, the repurchase ceilings would seldom come into play during a takeover contest with respect to title shares if Swiss public corporations were to continue the current practice of imposing certificate of incorporation limits on the maximum amount of registrable title shares.
a third party for purposes of securing control during a takeover contest would also, arguably, become more difficult under the Stock Corporation Act revision proposals. Under the proposals, preemptive shareholder rights would no longer be allowed to be excluded under the certificate of incorporation, but would instead require in each case a specific shareholder resolution excluding them as well as a requirement that no shareholder be arbitrarily favored or disfavored through such specific exclusion. The Senate proposals would additionally impose a shareholder approval standard for the exclusion of preemptive rights stricter than that under current law, and further require that there be "important grounds" for each preemptive rights exclusion. Protection against possible control takeovers is not included in the specific list of situations legally presumed to give rise to such an "important ground."

On the other hand, the Stock Corporation Act revision proposals would lessen the difficulties faced by Swiss public corporations under current law in obtaining shareholder approval for the introduction of preferred-voting shares. The proposals would do so by requiring an approval quorum based on the number of represented shares rather than on the number of total issued shares, as under current law. Although the revision proposals would also require that the par value, and therefore voting power, ratio of preferred-voting shares to ordinary voting shares not exceed ten, this ratio typically is not exceeded, as a matter of current practice, by Swiss corporations with issued preferred-voting shares.

substantially below 10% of issued share capital, see supra notes 136-39, since a denial based on the exceeding of such a limit would not trigger a duty to extend a repurchase offer.

190 Botschaft, supra note 29, art. 652b, ¶ 3, at 213; NaRE 1985, supra note 161, art. 652b, ¶ 2; StRE 1988, supra note 170, art. 652b, ¶ 3.

191 Botschaft, supra note 29, art. 653c, ¶ 2, at 216; NaRE 1985, supra note 161, art. 653c, ¶ 1, line 2; StRE 1988, supra note 170, art. 652b, ¶ 2.

192 StRE 1988, supra note 170, art. 704, ¶ 1, line 5b (approval of two-thirds of represented shares, together with simple majority of par value of all represented shares). Cf. supra note 30 and accompanying text.

193 StRE 1988, supra note 170, art. 652b, ¶ 2. Cf. supra note 31 and accompanying text.

194 Botschaft, supra note 29, art. 704, ¶ 1, line 2 at 237; NaRE 1985, supra note 161, art. 704, ¶ 1, line 2; StRE 1988, supra note 170, art. 704, ¶ 1, line 2 (approval by shares whose aggregate par value constitutes absolute majority of aggregate par value of all represented shares, together with approval of two-thirds majority of total represented shares).

195 Botschaft, supra note 29, art. 693, ¶ 2 at 232; NaRE 1985, supra note 161, art. 693, ¶ 2; StRE 1988, supra note 170 art. 693, ¶ II. See supra note 94. The fact that the revision proposals contain a grandfather clause which would apply to already-issued preferred-voting shares with a par value ratio in excess of ten has not failed to draw the attention of Swiss legal corporate planners. Cf. Lang and Messineo, Recent
5. SWISS SHAREHOLDER VOTING MECHANISMS

5.1. In General

It cannot be claimed that the takeover defense tools available to Swiss target corporations, with the possible exception of Vinkulierung, are significantly more restrictive than similar defense tools permitted under the laws of other countries. Moreover, it is theoretically possible for a Swiss investor, and, to a lesser extent for a non-Swiss investor, to acquire voting control of a Swiss target corporation whose title shares are subject to Vinkulierung, or where voting right restrictions apply, through tools of shareholder democracy similar to those available in Great Britain and the United States.

An investor seeking voting control of a Swiss corporation could, for example, acquire the necessary number of the corporation’s bearer shares and, if possible, registered title shares, either to call a special shareholders’ meeting or to submit shareholder proposals to be voted on at the annual shareholders’ meeting. Under the Swiss Stock Corporation Act, the right to call a special shareholders’ meeting may be exercised by shareholders representing at least 10% of a corporation’s issued equity capital. According to unanimous legal authority, this 10% requirement is also a prerequisite for the right to submit a shareholder proposal. In the absence of lock-up provisions in the certificate of incorporation, a simple shareholder majority would suffice for the...
adoption of a resolution, e.g., to eliminate or alter Vinkulierung provisions preventing the investor's registration, to convert restricted title shares into bearer shares, or to issue bearer shares to the investor in a private placement.\(^{199}\) Alternatively, a would-be acquiror could make an attractive public tender offer for the title shares of a target corporation, in order to motivate interested title shareholders into calling a special shareholders' meeting for the adoption of a resolution requiring the hostile bidder's registration.\(^{200}\)

As has been suggested during the Nestlé/Rowntree takeover contest,\(^{201}\) however, shareholders of Swiss corporations distinguish themselves by an unusual willingness to adopt board-proposed takeover defenses. They have done so despite the strident opposition expressed by shareholder groups and Swiss media\(^ {202}\) despite the adverse effect, in some cases, of the proposed defensive measures on the market value of issued shares,\(^ {203}\) and despite the fact that, occasionally, substantial holdings of voting shares may already lie in the hands of hostile acquirors.\(^ {204}\) The apparent readiness of shareholders of Swiss stock corporations to approve board-proposed takeover defense measures, as well as the recent instance where this was not the case,\(^ {205}\) must be seen in conjunction with certain Swiss shareholder voting mechanisms which

\(^{199}\) See Böckli, supra note 47, at 150.

\(^{200}\) Id. at 150, 152.

\(^{201}\) See Grunes Licht für Nestlé-Angebot an Rowntree, supra note 189 (preliminary opinion of U.K. Trade and Industry Minister Young finding that the differences between takeover conditions in U.K. and Switzerland arise from greater willingness of shareholders of Swiss corporations to adopt legally-permissible takeover defenses).

\(^{202}\) See, e.g., Sandoz-Vinkulierungsbestimmungen gutgeheissen, supra note 58 (title registration limit of two percent approved by 95% of shares represented at shareholders' meeting, despite publicized opposition of various shareholder groups); Opposition gegen die Vinkulierungsbestimmungen der Ciba-Geigy, supra note 51 (two percent limit on registrable title shares approved with 73% approval of shares represented at shareholders' meeting, despite vocal opposition of various pension fund representatives).

\(^{203}\) Cf., e.g., Hero/Jacobs: Nach dem “Takeover” das “Giveover”, supra note 102, at 21, 22 (rapid drop in market prices for Hero AG bearer shares subsequent to notice of proposed conversion of Hero AG bearer shares into title shares); with Verteidigungswillige Hero-Aktionäre, supra note 133 (proposed Hero bearer share conversion, coupled with issuance of non-voting PS, adopted with approval of 98% of represented shares).

\(^{204}\) See, e.g., Grossaufmarsch von Hero-Aktionären an der GV, supra note 132 (Hero bearer share conversion and stock split adopted with majority of widely-dispersed bearer shareholders, despite ownership of a near majority of such shares by Saudi-Arabian finance group).

\(^{205}\) See Die “La Suisse” vollführt einen Rückzieher, supra note 96 (recommendations to deposit shareholders by various deposit banks to withhold vote or vote against “La Suisse” board proposal for issuance of preferred-voting right shares to Swiss Bank Corporation effectively giving board majority control played crucial role in board's subsequent decision to withdraw proposal).
strongly influence the probability that proposals issuing from Swiss boards of directors will receive sufficient shareholder approval.

5.2. Physical Attendance Voting Requirement

According to unanimous legal authority and case law, the physical presence at a shareholders' meeting of either a shareholder or a shareholder representative is required under the Swiss Stock Corporation Act for the exercise of voting rights pertaining to Swiss shares.\(^{206}\) The purpose of the physical attendance requirement is to ensure that shareholders benefit from an exchange of opinions and are given a chance to participate in discussion prior to reaching a voting decision.\(^{207}\)

Relatively few shareholders of Swiss public corporations, however, possess the necessary time and money to vote their shares in person at a shareholders' meeting.\(^{208}\) Travel costs associated with personal attendance may seem disproportionately high to many shareholders, even when merely intracantonal railway travel is necessitated.\(^{209}\) Further, insofar as many Swiss public corporations provide little more than the minimum ten days' notice of shareholders' meetings required under the current Stock Corporation Act,\(^{210}\) the average shareholder may often find it difficult to arrange personal and business affairs so as to permit personal attendance.\(^{211}\) Because of such considerations, Swiss stock cor-
poration law also permits a shareholder of a Swiss corporation to appoint a representative to represent and vote her shares at a shareholders' meeting. As a rule, however, shareholders in a Swiss public corporation lack effective means to contact fellow shareholders who might be willing either to represent shares or to be represented at a shareholders' meeting. Under the Stock Corporation Act, a shareholder has no general right to demand from the corporation a list of title shareholders. The identity of bearer shareholders is typically not known by Swiss corporations and is instead known only by the Swiss banks where bearer shares have been deposited, and such banks are forbidden under banking secrecy provisions from revealing such information.

5.3. Deposit Voting Rights and SBA Guidelines

In order to assist Swiss corporations in meeting certain inordinately high quorum and approval requirements imposed under the current Stock Corporation Act, Swiss banks with access to holders of Swiss shares by virtue of deposit and administrative arrangements began in the years following World War I to collect general powers of attorney to represent and vote deposited shares, offering such services without cost to deposit customers. The current average share capital presence in shareholder meetings of Swiss corporations, between 50%
and 80%,217 is largely attributable to the exercise of so-called “deposit voting rights” by Swiss banks.218

As a rule, Swiss deposit banks agree to exercise deposit voting rights pursuant to a revocable, general full power of attorney to represent the shareholder at each shareholder meeting.219 The contents of the full power of attorney are typically stipulated by each deposit bank in accordance with uniform bank practices regarding the exercise of deposit voting rights,220 codified in the form of guidelines for SBA members.221 Where a deposit bank has received no special or general voting instructions, either solicited or unsolicited, from a deposit customer, the bank is required under the SBA Guidelines to vote the represented shares in favor of board proposals.222 A deposit bank must, however, briefly inform deposit shareholders of the existence of any “especially important” matter for discussion at a shareholders’ meeting and solicit special voting instructions relating thereto to the extent permitted by time considerations.223 Deemed “especially important” under the guidelines are, among other things, discussions as to alterations in either the composition of issued share capital, the transferability of title shares, or the representation of voting rights at a shareholders’ meeting.224 Special voting instructions must be similarly solicited under the

217 See H. DÜGGELIN, supra note 209, at 11 (60% to 80%). Cf. Temporär erhöhte Beteiligung des SBV an der Basler-Versicherungsgruppe, supra note 143 (64% share capital presence at Baliose-Holding special shareholders’ meeting); Verwaltungsratstreue “La Suisse”-Aktionäre, NZZ, May 28/29, 1988, No. 122 at 39 (78% share capital presence at “La Suisse” annual shareholders’ meeting); Sandoz-Vinkulationsbestimmungen gutgeheissen, supra note 58 (71% share capital presence at Sandoz annual shareholders’ meeting).

218 H. DÜGGELIN, supra note 206, at 11; H. P. SCHAAD, DAS DEPOTSTIMMRECHT DER BANKEN NACH SCHWEIZERISchem UND DEUTSchem RECHT 137 (1972). Cf. Kritische Gedanken zur “Aktionärstdemokratie,” supra note 212 (Swiss Bank Corporation was the first Swiss stock corporation to publicize amount of shares voted at shareholders’ meeting by representatives; roughly 85% of total shares voted cast by bank itself acting as representative of deposit shareholders).

219 See Botschaft, supra note 29, § 212.1, at 83. The Stock Corporation Act permits but does not currently regulate the representation of and exercise of voting rights by a Swiss deposit bank pursuant to a power of attorney or other authorization. See art. 689, ¶ 2 OR.

220 H. P. WEBER-DÜRLER, supra note 206, at 71-72.

221 Guidelines Concerning the Exercise of Deposit Voting Rights (Richtlinien über die Ausübung des Depotstimmrechts, SBA, Basel Sept. 1980 (rev. Nov. 1988)[hereinafter SBA Guidelines]). Such guidelines represent a private agreement applicable only to SBA members and are terminable at will. Botschaft, supra note 29, § 212.1, at 85.

222 SBA Guidelines, supra note 221, at ¶ 5.

223 Id. at ¶ 2.

224 Id. Thus, most of the hostile takeover defenses typically proposed by Swiss boards will trigger a duty to solicit special voting instructions under such provisions, first included in the SBA Guidelines in November 1988. Präzisierungen zum Depotstimmrech, NZZ, Nov. 4, 1988, No. 258, at 33.
SBA Guidelines in the event a deposit bank chooses to recommend to its deposit shareholders either to vote in abstention or against board proposals or to vote in favor of proposals by opposing shareholders. \textsuperscript{225} The SBA Guidelines do not require a deposit bank either to notify deposit shareholders of the existence of a public tender offer, \textsuperscript{226} or to represent proposals by an opposing shareholder or shareholder group at a shareholders' meeting. \textsuperscript{227}

For a variety of reasons, deposit voting rights are nearly always exercised in favor of board proposals. \textsuperscript{228} As an initial matter, shareholders in Swiss stock corporations, particularly bearer shareholders, are hampered in their ability to submit informed voting instructions due to a lack of access to information regarding the corporation itself, the shareholders' meeting and the specific proposals to be voted on. \textsuperscript{229} While current law requires, for example, that notice of a shareholders' meeting be provided at least ten days in advance of the scheduled meeting date, \textsuperscript{230} and although voting materials are as a rule provided by Swiss public corporations to both deposit banks and title shareholders, \textsuperscript{231} deposit banks are under no general duty, under either the Stock Corporation Act or the SBA Guidelines, to forward received voting materials to deposit shareholders, and the inclusion of such an undertaking in a deposit contract is rare. \textsuperscript{232} Thus, unless a shareholders' meeting is to take place to vote on an "especially important" discussion matter triggering a solicitation duty, bearer shareholders without daily

\textsuperscript{225} SBA Guidelines, supra note 221, at ¶ 3, 7.
\textsuperscript{226} Cf. Schmittthoff, Gore & HeinsiUS, ÜBERNAHMEANGEBOTE IM AKTIENRECHT, ARBEITEN ZUR RECHTSVERGLEICHUNG 51 n.41 (1976)(under West German uniform business practices code [Allgemeine Geschäftsbedingungen], deposit banks are required to notify deposit shareholders as to dissemination of public tender offer).
\textsuperscript{227} Botschaft, supra note 29, § 212.22, at 87. A bank is required to notify deposit shareholders of an opposing shareholder proposal to an "especially important" matter of discussion to the extent sufficient notice is provided to the bank. SBA Guidelines, supra note 221, at ¶ 2.
\textsuperscript{228} M. Stehli, supra note 110, at 69 n.19; J. P. Brunner, Die Publizität der schweizerischen Aktiengesellschaften, insbesondere das Postulat der Bilanzklarheit 81 (1976); E. Tillmann, supra note 26, at 68.
\textsuperscript{229} The adequacy of available corporate information, on the other hand, for providing the basis of an informed voting decision is discussed generally infra notes 249-272 and accompanying text.
\textsuperscript{230} See art. 700, ¶ 1 OR (corporation to provide notice of shareholders' meetings as specified in its certificate of incorporation, but a minimum of ten days in advance of meeting date; matters of discussion are to be made known at time of notice).
\textsuperscript{231} Due to control considerations, registered title shareholders typically receive voting materials directly from the corporation prior to each shareholders' meeting, together with a form power of attorney to appoint a representative, even though the title shares in question are deposited with a bank. E. Tillmann, supra note 26, at 31, 151.
\textsuperscript{232} E. Tillmann, supra note 26, at 11.
access to the official bulletin of the Swiss Registry of Commerce or other relevant Swiss financial publication will typically have no notice that a shareholders' meeting is even scheduled. On the other hand is the case where there is an "especially important" matter for discussion, such as certificate of incorporation amendments to adopt post-issuance Vinkulierung, which gives rise to a special solicitation duty. When such a situation occurs, and the issuer corporation provides no more than the ten days minimum notice of a shareholders' meeting, as required under current law, attempts by Swiss deposit banks to solicit and timely receive special voting instructions from deposit shareholders, especially from deposit shareholders residing outside Switzerland, will be rendered pointless from the outset.

Similarly, while Swiss public corporations are required under current law to make available for shareholder viewing certain minimum annual corporate and financial information at least ten days prior to each annual shareholders' meeting and will, as a matter of common practice, send such materials directly to title shareholders and deposit banks, Swiss deposit banks are under no corresponding legal obligation to forward this information to deposit shareholders. Furthermore, in many cases annual corporate and financial information will be mailed out by Swiss public corporations so close to the date of the shareholders' meeting that deposit shareholders will often not have access to this information to permit the submission of corresponding voting instructions in time for the meeting.

Absent the receipt of special voting instructions from deposit shareholders, a Swiss deposit bank is theoretically allowed by SBA Guidelines to recommend a vote in opposition to or abstaining from a

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233 Under art. 700, ¶ 3 OR, notice of a shareholders' meeting is to be published by a stock corporation in the Schweizerischen Handelsamtblatt if bearer shares have been issued.

234 See, e.g., M. Brunner, supra note 98, at 95 (bearer shareholders dependent on reading Handelsamblatt or other Swiss publication to discover when shareholders' meeting is to take place).

235 See supra note 210.

236 See E. Tillmann, supra note 26, at 132, 149. For this reason, the SBA Guidelines allow a deposit bank to decide, as an initial matter, not to conduct a special solicitation based on time factors. SBA Guidelines, supra note 214, at ¶ 2.

237 See art. 696 ¶¶ 1-3 OR (profit/loss statement, balance sheet, accountants' statement, annual business report, and specific proposals for application of annual corporate profits must be made available at principal and branch offices at least ten days prior to annual shareholders' meeting).

238 E. Tillmann, supra note 26, at 11.

239 See, e.g., H. Düggelin, supra note 209, at 42, 43 (study of practice of 92 Swiss public corporations with respect to time differences between making available of annual financial information and date of annual shareholders' meeting; 51 of 92 corporations provided information from 0-12 days before shareholders' meeting).
board proposal. For a number of reasons, however, such recommendations are rarely issued, especially with regard to board proposals for the adoption of hostile takeover protections.\textsuperscript{240} Swiss banks are so-called “universal banks,” performing substantial credit-lending, guarantee, investment and other services for Swiss public corporations.\textsuperscript{241} These other services could be adversely affected, even sacrificed to competitors, in the event a deposit bank were to make a recommendation to vote against or abstain from the board proposals of client corporations.\textsuperscript{242} More specifically, a change in control could sever business ties between a deposit bank and a corporation cultivated through means of interlocking directorates, giving deposit banks a strong incentive to ensure that adequate takeover defense protections are installed.\textsuperscript{243}

5.4. Voting Mechanisms Under Proposed Stock Corporation Act

The Swiss Stock Corporation Act revision proposals would alter the most important feature of current Swiss voting mechanisms, namely the deposit voting rights, by enacting certain basic features of the SBA Guidelines. There is disagreement under the various revision proposals over whether alterations should be made with respect to the current scope and nature of the voting solicitation duty of deposit banks under the SBA Guidelines.

The Swiss Federal Council, Senate and House of Representatives are currently all in agreement that the solicitation duty under the SBA guidelines should be expanded under enacted legislation to require the making of a solicitation prior to each shareholders’ meeting, regardless of the importance of the proposals to be voted on.\textsuperscript{244} Where special

\textsuperscript{240} J. P. Brunner, supra note 228, at 81; H. P. Weber-Duerler, supra note 206, at 72 n.137.
\textsuperscript{241} M. Stehli, supra note 110, at 89; E. Tillmann, supra note 26, at 68. See J. P. Brunner, supra note 228, at 81 (inside many Swiss banks, credit-lending business more significant than securities department).
\textsuperscript{242} See, e.g., H. P. Weber-Duerler, supra note 206, at 68; E. Tillmann, supra note 26, at 93. Cf. Die “La Suisse” vollführt einen Rückzieher, supra note 96 (recommendations by various deposit banks to vote against or abstain with respect to board-proposed issuance of preferred voting shares placing majority control in hands of Swiss Bank Corporation suspected to be result of injured feelings and/or desire of deposit banks not to see control in hands of rival bank).
\textsuperscript{243} See, e.g., M. Ungerer, Finanzplatz Schweiz 153 (1979)(large Swiss corporation without a deposit bank representative serving on its board of directors is a rarity); E. Tillmann, supra note 26, at 76 (1979 study by Swiss Cartel Commission; 154 deposit bank representatives on board of directors of 88 Swiss public corporations surveyed); H. P. Weber-Dürler, supra note 206, at 68.
\textsuperscript{244} Botschaft, supra note 29, art. 689d, ¶ 1, at 231; StRE 1988, supra note 170, art. 689d, ¶ 1; Der Nationalrat beläßt gewichtige Differenzen beim Aktienrecht, NZZ, Sept. 19, 990, no. 217 at 26 (reversal of prior position of House of Representatives requiring deposit bank solicitations only with respect to certain “important” matters).
voting instructions have not been timely received pursuant to a solicitation and where no general voting instructions have been issued, however, the House of Representatives would require the deposit institution to exercise deposit voting rights either in accordance with the interests of the deposit customer or to abstain.\textsuperscript{245} The Federal Council and the Senate would require deposit voting rights to be exercised in favor of board proposals.\textsuperscript{246}

Features of the current Stock Corporation Act revision proposals affecting Swiss shareholder voting mechanisms that enjoy wide support include lengthening from ten days to twenty days the minimum required periods both for giving notice of shareholders' meetings and for making available required corporate and financial information.\textsuperscript{247} Ironically, the original impetus for deposit voting rights, the need to meet approval requirements based on a quorum of total issued share capital for the taking of certain corporate actions, would be eliminated under the revision proposals and replaced by approval provisions based on a quorum of represented shares.\textsuperscript{248}

6. IMPACT OF INADEQUATE DISCLOSURE ON TAKEOVER CONTESTS


As a practical matter, the Swiss Stock Corporation Act currently grants the board of directors of a Swiss corporation unlimited discretion to undervalue corporate assets and overvalue corporate obligations. The directors may do this by taking legally unnecessary depreciation, or by setting aside equally unnecessary reserves, thereby creating so-called "hidden reserves."\textsuperscript{249} The term "hidden reserves" is accurate only inso-

\textsuperscript{245} NaRE 1985, \textit{supra} note 161, art. 689d, ¶ 2.
\textsuperscript{246} Botschaft, \textit{supra} note 29, art. 689d, ¶ II at 231. The House of Representatives recently affirmed this position. Der Nationalrat belässt gewichtige Differenzen beim Aktienrecht, \textit{id}. StRE 1988, \textit{supra} note 160, art. 689d, ¶ 2. Under the Senate proposals, a deposit institution would arguably not be required to solicit special voting instructions where such instructions could not be received in time, as under the current SBA \textit{Guidelines}. Cf. Botschaft, \textit{id}. (if the depositor fails to issue timely instructions)("Erteilt der Hinterleger nicht rechtzeitige Weisungen") \textit{with} StRE 1988, \textit{id}. (if instructions are not \textit{capable} of being timely received)("Sind Weisungen . . . nicht rechtzeitig \textit{erhältlich}"")[emphasis added].
\textsuperscript{247} Botschaft, \textit{supra} note 29, art. 696, ¶ 1, art. 700, ¶ 1, at 232, 236; NaRE 1985, \textit{supra} note 161, at art. 696 ¶ 1, art. 700, ¶ 1; StRE 1988, \textit{supra} note 170, art. 696, ¶ 1, art. 700, ¶ 1. Cf. E. TILLMANN, \textit{supra} note 26, at 149, 150 (lengthening to 20 days insufficient; legislative reformers obviously did not consider interests of many, if not most, bearer shareholders, i.e., those resident outside Switzerland).
\textsuperscript{248} Botschaft, \textit{supra} note 29, art. 704, ¶ 1, at 236-7; NaRE 1985, \textit{supra} note 161, art. 704, ¶ 1; StRE 1988, \textit{supra} note 170, art. 704, ¶ 1.
\textsuperscript{249} Art. 663, ¶ 2 OR (board discretion to create hidden reserves so long as deemed desirable to assure continued prosperity of corporation or issuance of regular dividends
far as, under current law, the creation or liquidation of reserves need not be made known to corporate shareholders.\textsuperscript{250} On the other hand, such "reserves" bear no relation to possible future corporate liabilities or required expenditures and thus constitute in reality an application of annual corporate profits, profits which would otherwise be available for the possible distribution to shareholders in the form of dividends.\textsuperscript{251}

Authorities agree that the average level of hidden reserves existing in the balance sheets of Swiss public corporations is high,\textsuperscript{252} and that cash flow figures for Swiss public corporations, therefore, normally provide a misleading indication of actual return-on-investment yields.\textsuperscript{253} The failure of these corporations to issue dividends that correspond to actual earned profits,\textsuperscript{254} together with the average investor's ignorance of the actual amount of hidden reserves, has resulted in an often massive undervaluation of Swiss shares. This undervaluation has occurred with respect to internal "substance value"\textsuperscript{255} as well as in comparison to shares of foreign corporations for which hidden reserves play only a limited or non-existent role.\textsuperscript{256}

According to the traditional "market for corporate control" take-
over theory, an investor will be inspired to acquire a target corporation’s shares based on a belief that its shares are undervalued and that greater efficiencies or innovations could be achieved and better corporate decisions could be reached if the corporation were under the investor’s control. Under legal systems permitting both hidden reserves and their “hidden liquidation,” however, stock market prices will bear little relation to the correctness or incorrectness of management decisions, and the selection of a target corporation will occur based on the accidental ability of an investor to glimpse the true extent of hidden reserves harbored by that corporation.

The existence of hidden reserves in Switzerland under current law tends to affect hostile takeover activity in two diametrically opposed ways. First, artificially low market prices for shares of Swiss public corporations suspected of having substantial hidden reserves, together with the even lower market prices for the restricted title shares of such corporations, represent a powerful incentive for the launching of hostile takeover attempts. Despite the invisibility of hidden reserves to the average shareholder, Swiss financial experts and sophisticated investors are nevertheless occasionally able to trace the accrual of significant reserves by a particular corporation. In the case of a takeover attempt through secondary market purchases of shares of a Swiss corporation with substantial hidden reserves, a “raider” stands to realize an inordinately large gain on the sale of his cheaply acquired shareholdings. The sale may be to a white squire purchaser, at prices close to the actual substance value of the shares, or it may be on the secondary market.


258 Thus, shortly before market purchases of 35% of the issued title shares of Sulzer AG by a unknown investor syndicate, a Bank Vontobel study pointed to such shares as the absolute cheapest Swiss shares from the view of substance value. Aktienrechtsreform: Raider, Super-oder Bad man?, supra note 89 (large cache of hidden reserves represents invitation for raiders).

259 See Aktienrechtsreform: Raider, Super-oder Bad man?, supra note 89 (noting that less than half of 31 million Sfr. gain on sale of securities in transaction of Saurer Holding actually booked in corporation’s balance sheet, thus indicating existence of sizeable hidden reserves).

260 See, e.g., Gewerbebank Baden in ruhigerem Fahrwasser, supra note 132.
market following the rise in market prices which have characterized recent takeover attempts against Swiss corporations.\textsuperscript{262} Similarly, in the case of a tender offer for shares of a Swiss corporation with substantial hidden reserves, a hostile bidder may offer two or three times the stock market price of the shares, and nonetheless be assured of having made a profitable acquisition in the event of a successful tender offer.\textsuperscript{263}

On the other hand, insofar as current Swiss law does not require a corporation's board of directors to notify shareholders of the liquidation of hidden reserves, significant hidden reserves serve as a form of insurance against financial losses that could result from managerial incompetence.\textsuperscript{264} The hidden liquidation of undisclosed reserves allows a board of directors to issue the same size dividends from year to year.\textsuperscript{265} Consequently, shareholders cast votes based on imperfect information and this further prevents timely shareholder recognition of the desirability of a change in control.\textsuperscript{266}

The current Stock Corporation Act revision proposals would continue to allow the unrestricted creation of hidden reserves, but would require limited disclosure of the liquidation of such reserves. Under the proposals of both the Swiss Senate and the House of Representatives, the aggregate amount of hidden reserves liquidated each year would be required to be disclosed in notes to financial statements to the extent these amounts exceeded the aggregate amount of newly-created reserves. Provided that the financial results obtained through such liquidation would thereby be presented in a considerably more favorable light.\textsuperscript{267}

\textsuperscript{262} See, e.g., Gerüchte und Fakten zur Publicitas, NZZ, Sept. 8, 1988, No. 209 at 37 (stock market prices for Publicitas share sharply influenced by unceasing rumors as to takeover attempts against corporation, despite fact that more than 60% of Publicitas shares effectively inalienable).

\textsuperscript{263} Böckli, supra note 47, at 152. Cf. supra note 149.

\textsuperscript{264} See FORSTMOSER & MEIER-HAYOZ, supra note 31, § 30, at 212 n.13 (hidden reserves above all represent means to "hush up" business set-backs or erroneous managerial decisions).

\textsuperscript{265} Cf. Arnold, supra note 32, at 41 (despite extraordinary loss of over one billion Sfr. suffered by Credit Suisse during 1977, net profit disclosed for such year in financial statements slightly higher than that for following year, during which no unusual corporate losses were suffered).

\textsuperscript{266} See, e.g., Lücken im Alusuisse Kontroll-Netz: Aktionär, erwache!, SHZ, Mar. 27, 1986, No. 13, at 3 (Alusuisse corporate restructuring measures in response to "overnight" appearance of 700 million Sfr. loss in financial statements arguably not necessary had top management been replaced earlier).

\textsuperscript{267} StRE 1985, supra note 170, art. 663b, line 8; Differenzbereinigung beim Aktienrecht, supra note 179 (newly-adopted resolution of House of Representatives to

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By creating a limited duty on the part of a Swiss board of directors to indicate to shareholders the existence of losses requiring the liquidation of unusually large amounts of hidden reserves, the Stock Corporation Act revision proposals would, in certain egregious cases, enable both shareholders and would-be acquirors to perceive more clearly instances of management inefficiency or incompetency. Since shares of most Swiss corporations would continue to be undervalued due to the existence of hidden reserves, rather than of indicated losses, a would-be acquiror or investor would be likely to use information about a corporation's losses as a basis for rejecting that corporation as a possible investment target. Because financial disclosures indicating substantial liquidations of hidden reserves, however, would only be required to be made with respect to extremely severe corporate setbacks which would be likely to draw publicity in any event, it is questionable whether the revision proposals will help to alert potential investors and shareholders in Swiss stock corporations to the need to oust or revitalize incompetent or inadequate management other than in situations where substantial damage has already occurred.

6.2. Corporate Management Disclosures

The Swiss Stock Corporation Act requires each corporation to make available to its shareholders an annual report disclosing and explaining annual financial results and presenting the activities of the corporation during the past year. No specific disclosures are required in the annual report under either the current Stock Corporation Act or its proposed revisions. Matters reflecting on the integrity of current or proposed members of the board of directors (e.g., board compensation, security ownership of board members and/or corporate transactions or business relationships affecting material interests of board members) need not be disclosed. Similarly, this information need not follow approach of Senate regarding hidden reserves).

268 Art. 696, ¶ 1, art. 724 OR. Cf. Botschaft, supra note 29, art. 663c, ¶ 1, at 223; NaRE 1985, supra note 161, art. 663c, ¶ 1; StRE 1988, supra note 170, art. 663c, ¶ 1 (annual report, including business report, to present business developments and financial condition of corporation).

269 The current Stock Corporation Act does not even require that aggregate personnel expenditures be disclosed separately in relevant financial reports. Cf. Botschaft, supra note 29, art. 663, ¶ 3, at 222; NaRE 1985, supra note 161, art. 663, ¶ 3; StRE 1988, supra note 170, art. 663, ¶ 3 (under proposed revisions disclosure of aggregate personnel expenditures would be required as separate line item).

270 Cf., e.g., SEC Regulation S-K, 17 CFR §§ 229.401-404 (1989)(applicable to annual reports, proxy statements, and offering circulars required to be sent to shareholders of U.S. public corporations)(with respect to officers and current and proposed directors, requiring disclosures as to identity and business experience, involvement in
PROTECTION AGAINST HOSTILE TAKEOVER

be disclosed in connection with making available board proposals to nominate new directors.

Because most annual business reports of Swiss public corporations do not provide a dependable basis for making a voting decision, corporate shareholders will either permit voting rights to remain unexercised or allow them to be exercised by Swiss deposit banks acting single-mindedly in favor of board proposals. The lack of required corporate disclosure about transactions or circumstances reflecting adversely on the integrity, and indirectly on the competency, of current board members, however, may prevent shareholders from being alerted to the possible need for a change in control before irreversible damage has set in.

6.3. Threshold Share Acquisitions, Tender Offer Disclosures and the Swiss Take-Over Code

The conduct of hostile takeover contests for Swiss public corporations is currently not explicitly dealt with under either the Stock Corporation Act or the proposed revisions to the Act. Given the present ability of a Swiss board of directors to effectively thwart hostile tender offers through the refusal of title share registration, concerns over the absence of regulations aimed at protecting shareholders during the course of the tender offer, e.g., by requiring the equal treatment of target shareholders, seem somewhat misplaced. The absence of certain tender offer disclosure requirements on the part of the prospective bidders, on the other hand, has in the past raised several real concerns regarding the adequacy of shareholder protections in the context of a tender offer, independent of the ultimate success or failure of the tender offer itself.

First, the absence of regulations requiring that investors publicly report share acquisitions of Swiss corporations in excess of a certain

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A. SCHETT, supra note 104, at 14.

See, e.g., Alusuisse-GV: Wallenskins Lager, SHZ, Apr. 30, 1987, No. 18 at 22 ("strictly confidential" pension retirement contracts totalling 15.7 million Sfr. for benefit of three top directors of Alusuisse, signed on behalf of corporation by same three directors, disclosed to public as result of employee indiscretion; losses of 724 million Sfr. suffered by Alusuisse in 1986, requiring massive corporate restructuring measures.)

But cf. Ueber "unseriöse" Uebernahmeofferten besorgt, NZZ, Sept. 7, 1988, no. 208 at 35 (press communiqué of Association of Swiss Exchanges expressing concern that tender offers for mere 51% of shares, such as those for shares of Rinsoz & Ormond, "La Suisse" and Publicitas., place undue pressure on target shareholders to tender shares into offer).
threshold has permitted investors to accumulate large blocks of substantially undervalued shares of Swiss public corporations over the market without paying selling shareholders an attendant “market premium.” In other words, investors have been able to take advantage of the absence of market information concerning the intended control takeover attempt which would have otherwise made the purchased shares more expensive. Following the sale of the cheaply-acquired share block to a third party deemed acceptable by the target corporation, investors have often been able to realize substantial sale premiums at the expense of the remaining shareholders, who are excluded from participation in such profits and are normally helpless to prevent or control the target corporation’s granting of rich pecuniary benefits to the third party purchasers.

Second, in the past the absence of required tender offer disclosure relating to the identity of the bidder and the bidder’s sources of financing enabled various unidentified investors to manipulate stock market prices for a particular corporation’s shares through the circulation of unfounded takeover rumors and the dissemination of anonymous tender offers for the corporation’s shares.

In order to “regulate public offers for interests in a public company in such a way that shareholders and officials of that company can take [sic] their decisions on the basis of clear information,” the Association of Swiss Exchanges presented, effective September 1, 1989, the Swiss Take-Over Code. The Code is a private self-regulatory agreement among the seven Swiss stock exchanges and the stock exchange members. The Code defines certain permissible and impermissible practices in connection with public tender offers, and is enforced by the Commission for Regulation of the Association of Swiss Exchanges (“Regulatory Commission”). The Commission decides whether a particular offer is in compliance with the Code and is authorized to take certain steps to ensure fulfillment of the Code through, among other

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274 Cf., e.g., supra note 262.
275 See, e.g., "La-Suisse" Aktionare locken wider den Stachel, NZZ, May 24, 1988, no. 118 at 9 (bank recipient of "La Suisse" shares in private placement for purposes of securing control assured under terms of standstill agreement of stock market gain on eventual sale of securities of at least 5.2 million Sfr., together with right to manage 120 million Sfr. investment portfolio for minimum of five years). But cf. supra note 242.
276 Cf., e.g., supra note 262.
278 Schiefplästiger Uebernahmekodex, NZZ, Aug. 12-13, 1989, no. 185 at 31. The Take-Over Code applies to all public tender offers for Swiss shares handled on a Swiss securities exchange and options or futures for such shares. Take-Over Code, § 2.
things, recommending to stock exchange member banks that they refuse to participate in the offer, if non-conforming. The refusal of stock exchange members to participate in a non-conforming offer means a refusal to finance the offer, to place payment or to act as the bidder's representative. The Regulatory Commission is nonetheless granted discretion under the Code to "allow dispensations from certain rules of the Code" when justified with respect to a particular tender offer.

The duties of a bidder under the Take-Over Code are extensive. Among other things, the Code requires each bidder to publish certain information concerning his identity, the identity of all beneficiary owners forming part of a bidder group, all sources of financing and all previous acquisitions of shares of the target corporation within the preceding year. A bidder for shares of a Swiss public corporation is also required to treat all shareholders in a comparable situation equally and to hold the tender offer open for acceptance for a maximum two-month period. The Code requires each bidder to present to the target company's board of directors a report of an accounting firm certifying the bidder's compliance with the Code's requirements. The offer conditions may not be changed during the course of the offer, other than to increase the consideration or to extend the offer within the two-month period. If, after the offer is closed, the bidder has, together with his earlier shareholdings, more than fifty percent of the target company's issued shares, the bidder is then required to purchase all securities presented for sale.

Most notably, however, the Code does not require would-be bidders to publicly disclose, prior to the dissemination of a public offer, share acquisitions in excess of a certain stipulated threshold. Such a provision was thought to be beyond the scope of a voluntary self-regulatory agreement, such as the Take-Over Code. Thus, in effect, while the Code reduces the ability of anonymous "bidders" to manipulate a company's market share prices through the dissemination of a

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279 Take-Over Code, § 9.
280 Id. at § 7.
281 Id. at § 8. It is to be hoped that the Commission exercise this discretion in a purely non-partisan manner. See Scheifständiger Uebernahmekodex, supra note 278.
282 Take-Over Code, §§ 4.1, 4.3, & 4.4.
283 Id. at §§ 3.1 & 3.3.
284 Id. at § 5.2.
285 Id. at § 3.5.
286 Id. at § 5.2. Cf. supra note 273.
287 According to the Chairman of the Regulatory Commission at the time of the Code's drafting, such a reporting duty would be more appropriately and effectively introduced through a provision of law. Kodex für das Raiderland Schweiz, Tages-Anzeiger, June 7, 1989, no. 129 at 39.
 SPECIOUS TENDER OFFER, THE CODE HAS NO IMPACT ON THE CONTINUED ABILITY
OF A WOULD-BE ACQUIROR TO QUIETLY ACCUMULATE LARGE AMOUNTS OF A SWISS
CORPORATION'S SHARES, EITHER ON THE MARKET OR THROUGH NEGOTIATED
PURCHASES. DISCLOSURE OF SHARE ACQUISITIONS IS REQUIRED UNDER THE
TAKE-OVER CODE ONLY IF THE ACQUIROR, AT ITS OPTION, ISSUES A PUBLIC
TENDER OFFER FOR SHARES OF THE TARGET CORPORATION.

ALTHOUGH THE TAKE-OVER CODE SETS FORTH NUMEROUS BIDDER OBLIGATIONS,
IT NONETHELESS EXPRESSLY PERMITS TARGET COMPANY MANAGEMENT "TO
ADOPT WHATEVER DEFENSIVE STEPS THEY WISH" WHICH COMPLY WITH THE LAW,
INCLUDING A REFUSAL TO REGISTER THE BIDDER AS TITLE SHAREHOLDER. THE
ONLY REAL TARGET COMPANY OBLIGATION UNDER THE CODE IS THE REQUIREMENT
THAT THE TARGET COMPANY CONVENE A SHAREHOLDERS' MEETING AS SOON AS
POSSIBLE AT THE REQUEST OF A BIDDER WHO HAS MORE THAN 10% OF THE COMPANY'S
SHARE CAPITAL, TAKING INTO ACCOUNT THE BIDDER'S EARLIER SHAREHOLDINGS AND ALL SHARES TENDERED INTO THE OFFER THUS FAR.

IT REMAINS TO BE SEEN WHETHER TARGET COMPANIES WILL COMPLY WITH THIS CODE OBLIGATION, AND — IN THE CASE OF NON-COMPLIANCE — HOW THE REGULATORY COMMISSION COULD EFFECTIVELY ENFORCE TARGET COMPANY COMPLIANCE.

A NUMBER OF TENDER OFFERS FOR THE SHARES OF SWISS PUBLIC CORPORATIONS, BOTH UNFRIENDLY AND FRIENDLY IN NATURE, HAVE BEEN LAUNCHED SINCE SEPTEMBER 1, 1989, THE EFFECTIVE DATE OF THE TAKE-OVER CODE. NONE OF THE HOSTILE TENDER OFFERS DISSEMINATED AFTER THE CODE WENT INTO EFFECT

288 See e.g., Tagesgespräch am Ring: Markt von der CS-Offerte Überrascht, NZZ, Apr. 12, 1990, no. 85 at 17 (foreign ed.) (in connection with commencement of "bear hug" exchange offer for shares of Bank Leu, Switzerland's fifth largest bank, CS Holding's announcement that it had, over prior two years, accumulated near majority of Bank Leu voting shares greeted with surprise by Swiss securities dealers and market participants).

289 See e.g., Philip Morris Cos.' Offer for Suchard Upsets Big International Investors, WSJ, July 16, 1990, col. 5 at 9 (Philip Morris Co. able to acquire 62% voting control of Jacobs Suchard through negotiated purchase of controlling shareholder's shares prior to launching successful tender offer for remaining shares; controlling shareholder received 120% premium over share price in tender offer).

290 Take-Over Code, § 6.1.

291 Id. at § 6.1. Under current law, a right to call a shareholders' meeting (and request a vote, for example, on the target company's refusal to register the bidder as title shareholder) may be exercised only by shareholders currently holding 10% of the corporation's equity capital, without regard to tendered shares.


293 Arguably, the only effective enforcement tool of the Regulatory Commission is its ability to recommend that Swiss stock exchange members not participate in a non-complying offer, a sanction solely directed at bidders, not target companies.

have, to date, been in compliance with the Code. In each case, the Regulatory Commission issued a recommendation or took other action which led or contributed to the failure of the unfriendly tender offer. In comparison to these hostile tender offers, all of the various tender offers unopposed by target company management and disseminated after September 1, 1989 have been found to be in compliance with the Code. Interestingly enough, each of these complying tender offers was disseminated by a bidder already in possession of majority or de facto voting control of the target company. Thus, the Code has yet to be tested in the case of a true hostile tender offer made in compliance with the Code, where the result of the tender offer is not already virtually assured because of the bidder’s prior, undisclosed stock accumulations.

7. CONCLUSION

On the one hand, protections against hostile takeovers provided under current Swiss law have proven to be inadequate to ward off the dangers normally associated with control takeover attempts, e.g., the diversion of valuable corporate resources such as time and money to the planning and execution of takeover defense measures and the subject of issued shares to market turbulence and speculation. On the other hand, hostile takeover protections have proven ultimately successful in blocking changes in control. This has proven true even where the attempted takeover would have been likely to increase both the efficiency and the profits of the target corporation. In this sense, present

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295 See id. at 163 (two of three hostile bids not in conformity with Code because bidder insufficiently identified; other bid made without regard to Code provisions).
296 Id. (in two cases, Commission recommended to stock exchange members their non-participation in offer).
297 Id. at 163-165.
298 Id.
299 See, e.g., Vier Jahre hartnäckige Belagerung, Luzerner NN, Mar. 3, 1989, at 5 (takeover struggle for Usego-Trimerco-Holding entering fifth year; total amount spent by Usego during takeover contest to date over one million Sfr.); Curti erwirbt Usego-Namenaktien von Schweri, supra note 78 (during course of recently-concluded Usego takeover contest, Usego virtually stripped of access to capital markets and substantially hindered in its ability to engage in transactions by virtue of takeover defense measures it had enacted).
300 See, e.g., supra note 262; Warteck-Uebernahmeversuch wurde zu PR-Gag, FuW, Sept. 24, 1988, No. 75, at 21 (tender offer for Brauerei Warteck shares disseminated on behalf of unknown bidder by trustee firm; manipulation by owner of trustee firm suspected). However, the Take-Over Code may have diminished the ability of an investor to manipulate stock prices through a specious tender offer.
301 See, e.g., Aktionärsschutz: Von “Zmorge” zum “Zvieri”, supra note 25 (proposed takeover concept of Hero by rival Jacobs Suchard promised higher profits for both corporations).
takeover defense measures available to Swiss public corporations are simultaneously overly-broad and too narrow.

In approaching the problem of ill-tailored takeover defense measures, Swiss legislators have until now primarily sought to close defensive gaps in current title share-related takeover protections. Examples of such attempts are the proposed elimination of the current market in dividend rights to unregistered title shares and the proposed creation of an investor duty to apply to the issuing corporation for title share registration. It is unclear, however, whether the disappearance of the present market in severed dividend rights to title shares contemplated under the revision proposals is alone sufficient to significantly decrease hostile takeover activity. Other proposed revisions to the Swiss Stock Corporation Act also make it less likely that takeover activity will decline. For example, the proposals would make it more difficult for a target corporation either to effect a partial or complete conversion of bearer shares into restricted title shares or to secure control through a share issuance to a white squire purchaser with the exclusion of preemptive shareholder rights.

At the same time, the Stock Corporation Act revision proposals have failed to eliminate certain unique incentives for investors to launch takeover attempts against Swiss corporations. For example, market prices and investment/yield ratios for Swiss shares, especially Swiss title shares, remain embarrassingly low due to the continued widespread existence of substantial undisclosed reserves and restrictive Vinkulierung provisions. Legislators have sought to improve the currently depressed market for title shares through proposals requiring transparent, standardized rules regarding denials of title share registration requests. Nevertheless, it is highly likely that the depressed market for title shares in fact results more from the limitation of trade in such shares to Swiss investors through Vinkulierung than from the absence of standardized Vinkulierung denial grounds and investor uncertainty about registration eligibility. Further, proposed revisions to the Stock Corporation Act which would require disclosure with respect to certain liquidations of hidden reserves would not affect the continued undervaluation of shares in Swiss stock corporations which are in healthy financial condition but possess substantial amounts of hidden reserves. Finally, neither the Take-Over Code nor currently proposed revisions to the Stock Corporation Act would impose a duty on acquirors to disclose

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02 This conclusion is practically compelled by, among other things, the enormous impact on the price of title shares of Nestlé and other Swiss corporations in the wake of announcements by these corporations of a decision to allow trade in their title shares to be opened to foreign investors. See supra note 47.
share acquisitions exceeding a certain threshold in the absence of a public tender offer. Therefore, investors could continue their current practice of quietly and inexpensively accumulating shares of a target corporation, then forcing the target corporation's board into arranging a share buy-out, and reaping enormous profits which are ultimately paid for by the target corporation and its shareholders.

An alternative approach to solving the problem of hostile takeovers in Switzerland, not currently taken by Swiss legislators, would be to correct distortions in the decision-making process of shareholders and would-be acquirors of Swiss corporations which arise under current law. Correcting these distortions would increase the probability that control takeover attempts would both occur and succeed only when launched against corporations in need of the innovation and greater efficiency that a change in control would represent. Such an approach would require basic changes in areas of the Stock Corporation Act traditionally unrelated to hostile takeover defense measures.

First, the current practice of basing investors' target takeover decisions on haphazardly acquired information about substantial hidden reserves and/or on the substantial undervaluation of the title shares of a potential target corporation could be eliminated through a combination of measures. Swiss public corporations could continue to be allowed to take unlimited amounts of hidden reserves but would simultaneously be required, under provisions of law or stock exchange listing regulations, to publish the actual cumulative value of these reserves. By making this information widely available, the market prices for the corporation's shares would more accurately reflect their true value. A more accurate market pricing of shares would also result if Swiss public corporations were required to make financial disclosures available on a semi-annual, rather than merely annual, basis. The timely public disclosure of a corporation's hidden reserves would provide higher investment/yield ratios and market prices, arguably "the best protection

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303 As pointed out in H.D. Vontobel, Kritische Betrachtungen zum Recht der Schweizerischen Effektenboerse 101 (1972), a sharpening of corporate disclosure duties by means of amendments to the currently toothless stock exchange listing regulations would have the advantage of automatically encompassing only Swiss public corporations and, further, could be achieved through a process significantly faster and simpler than that required for revisions to the Stock Corporation Act.

304 This step could well be accompanied by the taking away from shareholders of their vested right to determine dividend levels (Art. 646 para. III OR) since such a shareholder right is currently thwarted by the lack of a shareholder right to access to accurate corporate financial information and by a corresponding shareholder inability to judge the appropriateness of board-proposed dividend levels. Cf. supra notes 249-51. The Swiss House of Representatives recently rejected a member's motion to require disclosure of hidden reserves. See Differenz bereinigung beim Aktiensrecht, supra note 179.
against undesired takeovers in Switzerland." Moreover, Swiss public corporations could be required to allow issued title shares to be acquired by foreign investors at least up to a certain cumulative minimum threshold. As suggested by the experience of Nestlé, and certain other Swiss corporations, opening the trade in title shares could substantially improve the current artificially depressed prices for title shares. Finally, a duty to disclose acquisitions of shares exceeding a certain threshold of a public corporation’s total issued shares could be imposed on investors. This would eliminate the prospect of quick profit which currently lures speculative investors. It would ensure that only investors seriously interested in acquiring control of a Swiss stock corporation would launch takeover attempts, and it would enable selling shareholders to receive an appropriate price for their shares.

Second, as a way to increase the probability that shareholder decisions result in the approval of control takeover attempts against corporations actually in need of changes in control, certain revisions could be made to the shareholder voting process. For example, the intent of the Take-Over Code in requiring a bidder to disclose in a tender offer his identity, his share acquisitions, and his sources of financing, could best be realized by placing Swiss deposit banks under a companion duty to forward tender offer materials received from bidders to deposit shareholders. If necessary, costs for such services could be imposed on issuing corporations or deposit customers. Deposit banks could be placed under a similar duty with respect to the corporate and financial disclosures of Swiss public corporations generally. On the other hand, to allow deposit banks sufficient time to forward these materials to deposit shareholders, especially to those shareholders residing outside Switzerland, Swiss public corporations could be required to mail required disclosure materials to deposit banks at least thirty days in advance of the applicable deadline.

Until fundamental changes affecting certain disclosure and other

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305 Hartmann, supra note 12.
306 Because of the provisions of Lex Friedrich, a 33% cumulative foreign investment threshold suggests itself as an appropriate maximum threshold.
307 Imposing such a duty on Swiss deposit banks is arguably fair in light of the factual representation monopoly enjoyed by such banks. See H.P. WEBER-DUERLER, supra note 206, at 73.
308 Such a duty would presuppose both the conversion into law of the current uniform practice of Swiss public corporations of mailing required disclosure materials to Swiss deposit banks as well as the existence of a deposit bank’s duty to solicit voting instructions prior to each shareholders’ meeting.
309 An extension of the current ten-day minimum period, and the twenty-day minimum period under the revision proposals, to thirty days would be advisable to allow for the timely receipt and digestion of disclosed corporate information by shareholders. Cf. supra note 247 and accompanying text.

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duties of Swiss public corporations, Swiss deposit banks and investors have been made, hostile takeover protections in Switzerland will continue to prove inadequate. Swiss corporations and their shareholders will not be protected from the evils of speculative bearer share purchases, nor from attractive tender offers motivated by prospects of subsequent corporate asset-stripping and profitable sales to white squire purchasers. Conversely, under current Swiss legislative revision proposals, traditional takeover defense measures will continue to insulate management of Swiss corporations from control takeover attempts, whether or not the takeover attempts are desirable. These difficult issues await resolution through the ultimate adoption of revisions to the Stock Corporation Act by Swiss legislators, anticipated to occur in the mid-1990's.