



TOB Circular no. 1: Buyback programmes

dated 27 June 2013 (Status as of 1 January 2016^{*})

Fixed-price offers by an issuer (**offeror**) to purchase its own listed equity securities (**equity securities**) which are addressed publicly to the holders of such equity securities are public takeover offers within the meaning of Art. 2, let. i of the Financial Markets Infrastructure Act (**FMIA**). This also applies to public buyback programmes at market prices or executed by issuing put options. Such transactions (collectively: **buyback programmes**) are governed by the provisions of Chapter 4 of the FMIA, the FINMA Financial Market Infrastructure Ordinance (**FMIO-FINMA**) and the Ordinance of the Takeover Board on Public Takeover Offers (**TOO**). [1]

On 1 January 2016, the Financial Market Infrastructure Ordinance (**FMIO**) enters into force. The FMIO contains provisions designed to combat market abuse practices. Articles 120 to 122 of the FMIO specify for buyback programmes which behaviour is accepted and constitutes neither insider trading (within the meaning of Art. 143 FMIA) nor market manipulation (within the meaning of Art. 143 FMIA). [2]

The Takeover Board is responsible for the interpretation and application of Articles 125 to 141 of the FMIA. In contrast, compliance with the provisions on market abuse practices is supervised not by the Takeover Board, but by the FINMA. [3]

Pursuant to Art. 4, para. 2 TOO, this Circular lays down the requirements and conditions that must be satisfied for buyback programmes to be exempted from the ordinary takeover rules. [4]

The reporting procedure (section 6.1) applies to buyback programmes that fully comply with all the requirements and conditions laid down in sections 1 to 4 of this Circular. The Takeover Board shall issue an order in all other cases (section 6.2). [5]

If the buyback programme is exempted under the reporting procedure, this Circular shall supersede the ordinary takeover rules. Where however a decision is issued, the Board may dispense with the requirements and conditions laid down in this Circular and direct that the buyback programme must comply with any or all of the ordinary takeover rules. If the Takeover Board grants exceptions to margin no. 11 (total volume of buyback) or margin no. 23 (daily volume of buyback), then this is also the case for the application of the provisions preventing insider trading and market abuse practices (cf. Art 120, para. 3 FMIO). [6]

The exemption of a buyback programme from adherence to certain provisions of takeover law does not exempt the offeror from adhering to the rules of the Code of Obligations, for which the board of directors of the offeror remains responsible. The [7]



Takeover Board generally does not check adherence to Art. 659 of the Code of Obligations.

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1. Common conditions for all buyback programmes

The purpose or purposes of the buyback programme shall be defined clearly and completely. [8]

The buyback programme shall extend to all classes of the offeror's listed equity securities. [9]

The cancellation of repurchased equity securities may not lead to a significant change of control of the offeror, in particular by exceeding the thresholds of 33 1/3 or 50 percent of the voting rights. Any planned cancellation of equity securities already held is to be considered in a similar manner. [10]

The total volume of the buyback programme shall not exceed 10 percent of either the capital or voting rights nor 20 percent of the free tradable portion of the equity securities. [11]

The free tradable portion of the equity securities does not include securities held directly, indirectly or in concert with third parties of more than 5 percent, as calculated on the day of the submission of the application. The free tradable portion is to be calculated separately for each category of equity securities to which the buyback programme extends. [12]

The implementation of the buyback programme does not result in crossing the minimum thresholds required for listing in accordance with the rules of the stock exchange on which the securities are listed. [13]

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2. Common conditions for all buyback programmes

A comparable relationship must exist between the prices offered for different classes of securities. [14]

The offeror may not purchase equity securities for the purpose or purposes announced other than through the buyback programme. [15]

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3. Fixed-price offers and buyback programmes executed by issuing put options

3.1 Additional conditions

Offers may not be subject to any conditions. [16]

The offer period must be at least ten trading days. [17]

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3.2. Additional conditions

If the offeror is unable to satisfy all acceptance declarations, it must satisfy them on a pro rata basis. [18]

If during the period of the buyback programme, the offeror acquires equity securities at a price that exceeds the offer price, it must offer this price to all offerees. [19]

The offeror must provide confirmation to the Takeover Board that the conditions set out in margins no. 14-15, 18-19 and 27 have been satisfied no later than three trading days after expiry of the buyback programme. [20]

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4. Buyback programmes at market prices

4.1 Additional requirements

The maximum duration of the buyback programme shall be three years. [21]

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4.2 Additional conditions

When the buyback programme extends to several categories of equity securities, the provider must offer a bid price for each category at the same time. [22]

Article 123, para. 1 c FMIO rules that “*the scope of buybacks on the regular trading line does not exceed 25 percent per day of the average daily volume traded during the thirty days prior to the publication of the buyback programme.*” [23]

The average daily volume traded as per margin no. 23 is calculated from the sum of transactions on the regular trading line both within and outside of the order book at the stock exchange divided by the number of trading days in the 30 calendar days before publication of notice of the buyback. [23a]

The offeror shall confirm to the Takeover Board that the conditions of margins no. 15 [24]

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and 27 have been satisfied.

The bank or securities dealer appointed to conduct the buyback programme shall confirm to the Takeover Board that the conditions of margins no. 14 and 22-23a have been satisfied. [25]

Confirmations in accordance with margins no. 24 and 25 must be reported on the third trading day after the end of the buyback programme at the latest, and at least once a year. [26]

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5. Publication of the transactions

During a buyback programme the offeror publishes on its website at the latest on the fifth trading day following their implementation: [27]

1. the purchases of its own equity securities within a buyback programme, regardless of whether this takes place on the regular trading line or on a separate line;
2. the purchases of its own equity securities outside of the buyback programme;
3. the sales of its own equity securities, which are not taking place exclusively for the fulfillment of employee stock option plans.

This information is available on the website of the offeror for at least twelve months after the end of the buyback programme. [27a]

The publication will be made for each equity security (identified by ticker and ISIN) separately and contains the following information: [28]

1. type of transaction (see margin no. 27);
2. date;
3. number of equity securities;
4. price, without additional costs such as fees, commissions, etc.;
5. trading venue, if more than one trading venue is available.

Instead of the publication of each transaction as per margin no. 28, transactions can be published in aggregate per transaction for each trading day (c.f. margin no. 27). The price in this case is to be given as the volume-weighted average price (VWAP) of the transactions and the highest and lowest price at which the transactions were made. [28a]

In addition, the current total number of equity securities bought and sold so far, both inside and outside of the buyback programme (absolute number and percentage), is to be indicated. The percentage figure is to refer to the value (capital or voting rights) which also forms the basis for the calculation according to margin no. 11. [29]

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In the buyback announcement (margin no. 40), the offerors are to provide the exact web address at which the transaction is to be published. [30]

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6. Procedure

6.1 Reporting procedure

The reporting procedure applies if the requirements and conditions of sections 1 to 4 have been satisfied. [31]

The offeror shall report the buyback programme to the Takeover Board at least five trading days before the proposed date on which notice of the buyback is published in the electronic media using the applicable form (*Meldung eines Rückkaufprogramms, Annonce d'un programme de rachat*). The form is to be accompanied by the draft of the notice of the buyback, which must be submitted in German and French. [32]

If it appears that the conditions for an exemption under the reporting procedure have been met, the Secretariat of the Takeover Board shall confirm within three trading days following the receipt of such documents that it has duly taken note of the buyback programme and that no decision by the Takeover Board is required. [33]

Assessments of buyback programmes under the reporting procedure shall be subject to payment of a fee. This fee shall be 0.5 ‰ of the total amount of the offer, but shall not exceed CHF 20,000. [34]

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6.2 Decisions by the Takeover Board

The Takeover Board shall issue decisions in respect of buyback programmes which are not eligible for exemption under the reporting procedure (section 6.1). [35]

In such instances, the offeror shall submit an application in addition to the applicable form (*Meldung eines Rückkaufprogramms, Annonce d'un programme de rachat*). The offeror shall in particular provide reasons for any items that deviate from the rules laid down in this Circular. The application shall be submitted to the Takeover Board no later than 20 trading days prior to the launch of the buyback programme. [36]

The Takeover Board may vary the requirements and conditions of this Circular. If necessary, it may direct that the buyback programme must comply with any or all of the ordinary rules governing public takeover offers. [37]

The buyback programme may only be launched ten trading days after the Takeover Board's decision is [38]

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published.

Chapter 12 of the TOO is applicable. The fee shall be specified in accordance with Art. 118, para. 1 and 2 FMIO. [39]

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6.3 Content and publication of notice of a buyback

The minimum content of the notice of a buyback is governed by the Takeover Board's form *Meldung eines Rückkaufprogramms* and *Annonce d'un programme de rachat*, respectively. The Takeover Board may require additional information. [40]

The notice of the buyback is to be published in accordance with Art. 6 and 7 TOO. [41]

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6.4 Amendments to buyback programmes

Amendments to buyback programmes, including any amendment to the purpose, are to be requested by submitting an application to the Takeover Board together with the reasons for the amendment(s). Amendments may be reviewed under the reporting procedure, provided the applicable requirements are met. In all other instances, the Takeover Board issues a decision. [42]

On completion of the review process, the notice of the buyback is to be published in accordance with Art. 6 and 7 TOO. [43]

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6.5 Termination of buyback programmes

The offeror shall publish the number of repurchased equity securities in each class on its website one trading day after termination of the buyback programme and supply this information to the stock exchange and the Takeover Board as well as at least two financial information providers. The Takeover Board shall publish this information on its website. [44]

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6.6 Transitional provisions

This Circular replaces TOB Circular no. 1: Buyback programmes of 7 March 2013. [45]

For all current buyback programmes, the transaction reports described in section 5 of Circular no. 1 of 7 March 2013 (based on the form "transaction reports during buyback programmes" - *Transaktionsmeldungen während Rückkaufprogrammen*) are to be replaced by publication in accordance with margins no. 27 to 30 by no later than 1 September 2013. [46]

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Swiss Takeover Board
Übernahmekommission
Commission des OPA
Commissione delle OPA
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* References to statutory and regulatory instruments have been adapted following the enactment of the Financial Markets Infrastructure Act and its implementing ordinances.