TOB Circular no. 1: Buyback programmes

dated 27 June 2013

Fixed-price public offers by an issuer (**offeror**) to purchase its own listed equity securities (**equity securities**) are public offers within the meaning of Art. 2 let. e of the Swiss Stock Exchange Act (**SESTA**). Public offers also include public buyback programmes executed by issuing put options or at market prices. Such transactions (collectively: **buyback programmes**) are governed by the provisions of Chapter 5 of SESTA, the Ordinance of the Swiss Financial Market Supervisory Authority on Stock Exchanges and Securities Trading (**SESTO-FINMA**) and the Ordinance of the Takeover Board on Public Offers (**TOO**). [1]

On 1 May 2013, the revised Ordinance of the Swiss Financial Market Supervisory Authority on Stock Exchanges and Securities Trading (**SESTO**) came into force with provisions designed to combat market abuse practices. Article 55 let. b to let. d of SESTO specify for buyback programmes which behaviour is accepted and constitutes neither insider trading (Art. 33 let. e SESTA) nor market manipulation (Art. 33 let. f SESTA). [2]

The Takeover Board is responsible for the interpretation and application of Articles 22 to 33d SESTA. In contrast, compliance with the rules on market abuse is supervised not by the Takeover Board, but by FINMA. [3]

Pursuant to Art. 4 (2) TOO, this Circular lays down the requirements and charges that must be satisfied for buyback programmes to be exempted from general provisions governing public offers. [4]

The reporting procedure (section 6.1) applies to buyback programmes that satisfy all the requirements and conditions laid down in sections 1-4 of this margin number. 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 general provisions governing public offers. Where 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 general provisions governing public offers. If the Takeover Board permits exceptions to margin no. 11 (total volume of buyback) or 23 (daily volume of buyback), then this is also the case for the application of the provisions forbidding insider trading and market abuse (cf. Art 55 para. 3 SESTO). [6]

The exemption of a buyback programme from adherence to certain provisions on public offers 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.

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 volumes of the buyback programme shall not exceed 10% of either the capital or voting rights 20% of the free tradable portion of the equity securities. [11]

The free tradable portion of the equity securities does not include, directly, indirectly, or held in concert with third parties, securities of more than 5 percent, as calculated on the application submission date. 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 have the consequence of crossing the minimum thresholds required for listing in accordance with the rules of the stock exchange on which the securities are listed. [13]

2. Common requirements 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]

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 requirements

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 margin 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 conditions

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

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4.2 Additional requirements

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 55b para. 1 c of the FINMA Stock Exchange Ordinance 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 number 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 requirements of margin no.s 15 and 27 have been satisfied. [24]

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

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

5. Publication of the Transactions

The offeror publishes on its website at the latest on the fifth trading day following the sale: [27]

a. 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;

b. the purchases of its own equity securities outside of the buyback programme;

c. 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]

a. type of transaction (see margin number 27);

b. date;

c. number of equity securities;

d. price, without additional costs such as fees, commissions, etc.;

e. trading venue, if more than one trading venue is available.

Instead of the publication of each transaction as per margin number 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 [28a] transactions were made.

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]

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]

6. Procedure

6.1 Reporting Procedure

The reporting procedure applies if the conditions and requirements of chapters 1-4 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, Annonced'un programme de rachat)*. The form is to be accompanied by the draft of the buyback announcement, which must be submitted in German and French. [32]

If it appears that the conditions for an exemption from the reporting procedure have been met, the Secretariat of the Takeover Board shall confirm within three trading days 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 shall be 0.5 ‰ of the total amount of the offer, but shall not exceed CHF 20,000. [34]

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 [36] no later than 20 trading days prior to the launch of the buyback programme.

The Takeover Board can 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 general provisions governing public offers. [37]

The buyback programme may only be launched ten trading days after the order is published. [38]

Chapter 12 of the TOO is applicable. The fee is specified in Art. 69 para. 6 TOO. [39]

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6.3 Content and publication of notice of a buyback

The minimum content of notice of a buyback is governed by the Takeover Board's form *Meldung eines Rückkaufprogramms*. The Takeover Board can require additional information. [40]

The notice of the buyback is to be published in accordance with Art. 6-6b 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, notice of the buyback is to be published in accordance with Art. 6-6b 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 Takeover Board and 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 margin no. 27 to 30 by no later than 1 September 2013. [46]