

Corporate Finance/M&A - Switzerland

Rules applicable to buy-back programmes

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[Introduction](#)
[Buy-back programmes](#)
[Procedure](#)
[Transitional provisions](#)
[Comment](#)

Introduction

Swiss issuers whose equity securities are listed on a Swiss stock exchange are subject to the rules and regulations of the Swiss Stock Exchange Act, in particular the provisions on public takeover offers. Fixed-price public offers by a listed issuer to purchase its own listed equity securities or public buy-back programmes implemented by issuing put options by the issuer also qualify as public takeover offers within the meaning of the act and must therefore comply with the rules of the act (in particular, Chapter 5) and its implementing provisions set out in the Swiss Financial Market Supervisory Authority (FINMA) Ordinance on Stock Exchanges and Securities Trading and the Takeover Board Ordinance on Public Takeover Offers.

On May 1 2013 the revised Ordinance on Stock Exchanges and Securities Trading entered into force with provisions designed to combat market abuse. The ordinance specifies which behaviour is acceptable and constitutes neither insider trading nor market manipulation. Further, on June 27 2013 the Takeover Board modified Circular 1 of March 7 2013 regarding buy-back programmes. In particular, the methods for publishing transactions on the website of the offeror are now defined and the obligation to report these transactions to the Takeover Board has been abrogated. The calculation of the daily volume limit in Article 55b(1)(c) of the ordinance is outlined and the regime for confirmations of the offeror and the bank or securities dealer appointed to conduct the buy-back programme was modified accordingly.

Buy-back programmes

General conditions and requirements

All buy-back programmes must fulfil the following six conditions in order to be exempted under the circular:

- The purpose of the programme must be set forth in a clear and complete manner.
- The programme must apply to all categories of the offeror's listed equity securities.
- The programme's implementation may not result in any material change in the control over the offeror.
- The total volume of the buy-back programme may not exceed 10% of either the capital or the voting rights, as set forth in the latest entry in the companies register.
- The total volume of the buy-back programme may not exceed 20% of the free float calculated as of the date of submission of the application for exemption in accordance with the rules of the relevant stock exchange.
- As a result of the buy-back programme, the free float may not fall below the minimum threshold for listing in accordance with the rules of the relevant stock exchange.⁽¹⁾

If all of the conditions are fulfilled and the issuer has filed an application for exemption with the Takeover Board in a timely manner, the programme is in principle exempt under the circular, as long as the issuer complies with the further general requirements which apply to the implementation of all buy-back programmes and the further specific requirements applicable to the particular type of buy-back programme. In particular, for all buy-back programmes, the issuer must ensure strict compliance with the following requirements:

- The ratio of the prices offered for the different categories of listed securities must be

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fair;

- The offeror may not purchase securities for which the buy-back programme has been launched through means other than the buy-back programme, unless such purchases are purchased for purposes other than those for which the buy-back programme was launched;
- Any purchases or sales outside of the buy-back programme must be reported every fifth trading day according to Chapter 8 of the Takeover Board Ordinance on Public Takeover Offers; and
- The offeror may not announce or implement a buy-back programme during a blackout period.

Blackout periods apply:

- if and as long as price-sensitive information is kept confidential by the issuer (in line with the rules of the relevant stock exchange);
- for a period of 10 trading days before the release of financial results; and
- whenever the accounting reference date of the most recently published consolidated accounts dates back more than nine months.

Further programme-specific conditions and requirements

Further conditions and requirements apply depending on whether the programme is based on a fixed-price offer (including put options) or purchase transactions at market price.

Programmes based on a fixed-price offer or put options may not be subject to any conditions, if all acceptance notifications of accepting shareholders cannot be satisfied, they must be satisfied on a *pro rata* basis. Further, the offer period for such offers must last at least 10 trading days. In addition, if, during the period of the buy-back programme, the offeror acquires securities at a price that exceeds the offer price, it must offer that new price to all offerees. The offeror must provide confirmation that the conditions have been satisfied to the Takeover Board within three trading days of expiry of the buy-back programme.

Buy-back programmes based on purchases at market price may not provide for more than three years.

If the buy-back programme covers different classes of securities, the offeror must place simultaneous bids for each class. The scope of buy-backs on the regular trading line may not exceed 25% per day of the average daily trading volume traded during the 30 days before publication of the buy-back programme. In the revised circular, a definition of the calculation of the average daily volume traded has been included (ie, the average daily volume traded 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 buy-back). The relevant price may not exceed the last price paid on the exchange or the price last offered on the exchange by a person or entity other than the offeror. The offeror, as well as the bank or securities dealer appointed to conduct the buyback programme, must confirm to the Takeover Board that the respective requirements have been satisfied, whereby such confirmations must be reported on the third day after the end of the buy-back programme and at least once a year.

Publication of transaction

According to the revised circular, by the fifth trading day following the sale, at the latest, the offeror must publish on its website:

- the purchases of its own equity securities within a buy-back programme, regardless of whether this takes place on the regular trading line or on a separate line;
- purchases of its own equity securities outside of the buy-back programme; and
- sales of its own equity securities which have not taken place exclusively for the fulfilment of employee stock option plans.

Such information is to remain available on the offeror's website for at least 12 months after the end of the buy-back programme. The publication must be made for each equity security separately.

Procedure

Reporting procedure

The reporting procedure applies if conditions and requirements have been satisfied. However, the Takeover Board has decided in the past that even when all the prerequisites have been met, it may decide to issue a decision on exemption and not apply the reporting procedure. This is the case in particular when the application contains special features and the questions thereby raised are of general interest.

When the reporting procedure applies, the offeror must report the buy-back programme

to the Takeover Board at least five trading days before the proposed date on which notice of the buy-back programme is published using the applicable form, which must be accompanied by the draft of the buy-back announcement. 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 buy-back programme, and a board decision is not required.

Takeover Board decisions

The Takeover Board issues decisions in respect of buy-back programmes which are not eligible for exemption under the reporting procedure. Should this be the case, the offeror must submit an application in addition to the (standard) applicable form, in which the offeror must, in particular, provide reasons for any items that deviate from the rules laid down in the circular. Such an application must be submitted to the board no later than 20 trading days before launch of the buy-back programme.

In such cases the board can vary the requirements and conditions of the circular. If necessary, it may direct that the buy-back programme must comply with any or all of the normal rules governing public takeover offers. The buy-back programme may be launched only 10 trading days after the decision is published.

Amendments to buy-back programmes

Requests for amendments to buy-back programmes, including any amendment to the purpose, must be filed by submitting an application to the Takeover Board together with the reasons for the amendments. Amendments may be reviewed under the reporting procedure, provided that the applicable requirements are met. In all other instances the board shall issue a decision.

Termination of buy-back programmes

The offeror must publish the number of repurchased equity securities in each class on its website one trading day after termination of the buy-back programme and supply this information to the stock exchange and the Takeover Board, as well as to at least two financial information providers. The board publishes this information on its website.

Transitional provisions

In the past, purchases outside the buy-back programme for other purposes were to be reported and published as follows:

- Sales of the offeror's own equity securities during the buy-back programme had to be reported to the stock exchange and to the Takeover Board on the first trading day following the sale and published by the offeror by the fifth trading day, at the latest, following the sale.
- In buy-back programmes at market prices, individual buy-backs which were part of the buy-back programme had to be reported to the stock exchange and the Takeover Board and published by the offeror by the fifth trading day, at the latest, following the sale.
- Due to the revised circular, such transactions must be published on the offeror's website on the fifth trading day following the sale. This new method of publication was due to be implemented no later than September 1 2013.

Comment

The revised circular introduces, in particular, some changes to the reporting and publication procedure. It is therefore important that all existing buy-back programmes take the revised circular into account, since amendments to the publication procedures have applied since September 1 2013.

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Endnotes

(1) See Takeover Board Decision 522/01, January 4 2013, concerning Absolute Invest AG, whereby the board decided that Absolute had, among other things, exceeded the trading volume as indicated in the reporting procedure and did not disclose a material change in the control over the offeror.

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