SFC 證監會

TAKEOVERS BULLETIN

ISSUE NO. 15
DECEMBER 2010

A periodic newsletter to help participants in Hong Kong's financial markets better understand the Codes on Takeovers and Mergers and Share Repurchases

Introduction

1. In this issue the Executive reminds directors not to make or trigger a general offer during a black out period.
2. The Executive updates the market on the first six months of the post-vetting regime and reminds market practitioners to include the directors' responsibility statements in Post-Vet announcements.
3. The Executive clarifies its approach to confirmations of past shareholdings in placing and top up transactions.
4. The Takeovers Panel rules no mandatory offer obligation triggered for Merdeka Resources Holdings Limited.
5. Templeton Asset Management Ltd. publicly censured for dealing disclosure breaches.
6. Update on the activities of the Takeovers Team for the six months ended 30 September 2010.
7. Finally the Executive wishes all our readers a healthy and happy 2011.

Highlights

- Reminder that no general offer should be made or triggered during a black out period
- Update on the post-vetting regime and reminder about directors' responsibility statements
- Confirmation of past shareholdings required in placing and top up transactions
- Takeovers Panel rules no mandatory offer obligation triggered for Merdeka Resources Holdings Limited
- Templeton Asset Management Ltd. publicly censured for dealings disclosure breaches
- Update on takeover activities for six months ended 30 September 2010

Directors of listed issuers should not make or trigger a general offer during a black out period

On 30 September 2010 The Stock Exchange of Hong Kong Ltd (SEHK) issued a letter to listed issuers regarding directors' compliance with the Model Code for Securities Transaction by Directors of Listed Issuers (Model Code). Among other things, the letter reminds directors about the black out period for dealings before results announcements.

The Executive notes that "dealings" and "securities" are widely defined under the Model Code. "Dealings" include any acquisition, disposal or transfer of, or ***offer to acquire***, dispose of or transfer of, or creation of pledge or security interest in, or grant of options over the securities in the issuer. "Securities" include shares, options, nil-paid rights and

convertible securities. While the overriding principle is that a director must not deal in the issuer's securities when in possession of unpublished price sensitive information, Rule 3(a) of the Model Code sets out an absolute prohibition that a director must not deal in any securities of the listed issuer on any day during the "black out period," which starts from (i) 60 days before publication of the annual results and (ii) 30 days before publication of quarterly results and half-year results and includes (iii) the day on which the financial results are published. A breach of the required standard in the Model Code will be regarded as a breach of the Listing Rules of the SEHK.

It follows that during a black out period a director should be aware that he is not at liberty (i) to make a voluntary general or partial offer for the securities of the listed issuer; or (ii) to make an acquisition that may lead to an obligation to make a mandatory general offer under the Takeovers Code. It is solely the duty of the director concerned to apprise himself of all applicable rules and regulations before proceeding with an offer or triggering a mandatory general offer for the securities of the listed issuer or otherwise dealing in any securities of the listed issuer. This is in line with General Principle 4 of the Takeovers Code that an offeror should announce an offer only after careful and responsible consideration. Directors are reminded that if they announce a firm intention to make an offer or trigger a mandatory general offer obligation for the securities of a listed issuer during a black out period, they will be required to proceed with the offer in accordance with the Takeovers Code.

The Executive has recently added a standard question about whether the offeree company is in a black out period to the initial comment fax when passing comments on first draft offer announcements. It is hoped that this will act as a reminder about a director's obligations under the Model Code.

Separately the Executive notes that, pursuant to paragraph 7(d) of the Model Code, certain dealings are not subject to the black out period restrictions. In particular, undertakings to accept, or the acceptance of, a general offer for shares in a listed issuer made to shareholders other than those that are concert parties of the offeror are not subject to the provisions of the Model Code.

In cases of doubt early consultation with the Listing Division of the SEHK and the Executive is strongly encouraged.

Post-vetting regime: Update and reminder to include Rule 9.3 responsibility statements for announcements included in the Post-Vet List

Since the implementation of the new post-vetting regime on 25 June 2010 the Executive has monitored compliance by market practitioners. The Executive is pleased to note that overall market practitioners have complied with the new requirements detailed in revised Practice Note 5 without difficulty. The vast majority of post-vetted announcements have followed the prescriptive guidance and have included appropriate information as set out in Practice Note 5. Similarly, where prior consent of the Executive is required, parties have taken timely action and allowed reasonable time for the Executive to consider the matter at hand prior to the publication of the relevant announcement. In most cases published versions of the announcements have been filed reasonably promptly with the Executive if not immediately in accordance with revised Practice Note 5.

A small number of post-vetted announcements, however, have been issued without the requisite responsibility statement by the directors of the issuer of the announcement as required by Rule 9.3 of the Takeovers Code. Coincidentally each of these announcements related to placing and top-up transactions. In each case the directors concerned promptly issued a clarification announcement confirming that they took full responsibility for the information contained in the original announcement.

The Executive wishes to take this opportunity to encourage market practitioners to refer to Practice Note 5 in order to familiarise themselves with the various requirements under the regime. In particular issuers of announcements and their advisers are reminded of the requirement in Rule 9.3 of the Takeovers Code that all announcements must contain a full responsibility statement by all directors of the company issuing the announcement. Parties who issue announcements are also reminded of the requirement for timely filing of the published version of the announcement with the Executive.

Currently the Post-Vet List covers the following five types of announcements: (i) announcements of the appointment of independent financial advisers under Rule 2.1; (ii) announcements of the despatch of circulars under Rule 8 or 25; (iii) announcements of delay in despatch of circulars under Rule 8.2 or Rule 8.4; (iv) announcements of the appointment and resignation of directors of the offeree company under Rule 26.4 and Rule 7; and (v) announcements of placing and top-up transactions under Note 6 on dispensations from Rule 26.

For the avoidance of doubt, practitioners should note that any announcement that is not specified in the Post-Vet List (including but not limited to the first announcement of a whitewash proposal, the results of general meeting approving the whitewash waiver and completion announcements under paragraph 6 of the Whitewash Guidance Note (Schedule VI of the Codes)) is still required to be submitted to the Executive for comment before publication in accordance with Rule 12.1. Failure to comply with Rule 12.1 may result in disciplinary action being taken against the relevant issuer.

If there is any doubt as to whether an announcement qualifies for post-vetting the Executive should be consulted at the earliest opportunity.

Confirmations of past shareholdings in placing and top-up transactions

A placing and top-up transaction typically involves a substantial or controlling shareholder placing his existing shares to independent placees before subscribing for new shares not exceeding the number placed. If the subscription results in the placing shareholder crossing over the 30% threshold or exceeding the 2% creeper, the shareholder would incur a general offer obligation under Rule 26.1.

Note 6 on dispensations from Rule 26.1 provides that a waiver will normally be granted where a shareholder, who together with persons acting in concert with him holds 50% or less of the voting rights of a company, places part of his holding with one or more independent persons (see note 7 on dispensations from Rule 26) and then, as soon as is practicable, subscribes for new shares up to the number of shares placed at a price substantially equivalent to the placing price after taking account of expenses incurred in the transaction. Note 6 further provides that there is no need to seek a waiver where the placing shareholder, together with persons acting in concert with him has continuously held more than 50% of the voting rights of the company for at least 12 months immediately preceding the relevant placing and top-up transaction. Given this the Executive expects to receive a confirmation that the controlling shareholder and his concert parties have continuously held over 50% shareholding in the 12 months preceding the placing and top-up transaction in order to verify that there is no requirement for waiver.

In such circumstances and in the interest of clarity to shareholders and the market generally, the Executive strongly encourages listed issuers when announcing placing and top-up transactions in which the placing shareholder (together with persons acting in concert) has continuously held over 50% of the voting rights of the issuer for the last 12 months to state such information in the announcement. In the absence of public disclosure to such effect, a separate confirmation should be provided to the Executive immediately following the publication of the relevant placing and top-up announcement.

As with all cases where any party is in doubt as to how any provision of the Codes applies the Executive should be consulted.

Takeovers Panel rules no mandatory offer obligation triggered for Merdeka Resources Holdings Limited (MRH) (formerly CCT Resources Holdings Limited)

On 9 December 2010 the Takeovers Panel ruled that there was insufficient evidence to suggest that Merdeka Commodities Limited (MCL) and its sole shareholder, Mr Lai Wing Hung, were acting in concert with CCT Telecom Holdings Limited and its wholly-owned subsidiary, Manistar Enterprises Limited (Manistar), in an acquisition by MCL of 13.14% of the voting rights in MRH from Manistar. The Panel also considered that, in light of the circumstances of the case, any presumption that the parties are acting in concert under class (1) of the definition of acting in concert in the Takeovers Code as a result of the acquisition had been rebutted. Accordingly, a mandatory general offer obligation under Rule 26.1 of the Takeovers Code had not been triggered as a result of the acquisition.

On 25 November 2010 the Takeovers Executive received an application for a rebuttal of the presumption that the parties were acting in concert as a result of the acquisition. The matter was referred to the Panel under section 10.1 of the Introduction to the Codes as there were particularly novel, important or difficult points at issue. The decision was published on 20 December 2010.

The full written decision of the Panel can be found in the "Prospectuses, Takeovers & Mergers" – "Takeovers and Mergers" – "Panel and Executive Decisions / Statements" section of the SFC website.

Templeton Asset Management Ltd. publicly censured for dealing disclosure breaches under the Takeovers Code

On 14 December 2010 the Executive publicly censured Templeton Asset Management Ltd. (Templeton) for its breaches of Rule 22 of the Takeovers Code.

A copy of the Executive's Statement dated 14 December 2010 can also be found in the "Prospectuses, Takeovers & Mergers" – "Takeovers and Mergers" – "Panel and Executive Decisions / Statements" section of the SFC website.

Reminder to associates of their dealing disclosure obligations

The Executive wishes to take this opportunity to remind practitioners and parties who wish to take advantage of the securities markets in Hong Kong that they should conduct themselves in matters relating to takeovers and mergers in accordance with the Takeovers Code. Associates with a 5% or more interest in the offeree company or offeror company must report their dealings in the offeree company (or offeror company as well in the case of a securities exchange offer) during an offer period in accordance with Rule 22 of the Takeovers Code.

Update on the activities of the Takeovers Team in the day-to-day administration of the Codes

Further to our update on the activities of the Takeovers Team in the June 2010 issue of the Takeovers Bulletin, in the six months ended 30 September 2010, the Executive dealt with 22 takeovers-related cases (including privatisations, voluntary and mandatory general offers and off-market and general-offer repurchases) and 15 whitewashes. The Executive also received 119 ruling applications.

The Executive referred one case to the Takeovers Panel for a ruling during this six-month period as particularly novel, important and difficult points were at issue.

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