

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. This issue of the Takeovers Bulletin contains a revised Practice Note 15 that clarifies the Executive's practice regarding confirmation of sufficiency of financial resources.
2. The Executive reminds financial advisers of the importance of maintaining proper compliance and monitoring systems.
3. The consultation on the proposal to extend the application of the Codes to SFC-authorized real estate investment trusts (REITs) has closed.
4. Finally, we are pleased to announce reappointments to the Takeovers and Mergers Panel, the Takeovers Appeal Committee, the Nominations Committee and the Disciplinary Chair Committee.

Highlights

- Revised Practice Note 15
- Reminder of the importance of maintaining proper compliance and monitoring systems
- Consultation Paper on the proposal to extend the application of the Codes to REITs
- Reappointments to the Takeovers and Mergers Panel, the Takeovers Appeal Committee, the Nominations Committee and the Disciplinary Chair Committee

Revised Practice Note 15 (PN15) – Confirmation of financial resources in cash offers

The Executive would like to clarify that as a matter of practice the financial adviser to the offeror should provide the Executive with a signed letter:

- (i) confirming that the financial adviser is satisfied that there are sufficient resources available to satisfy the offer in full;
- (ii) setting out the basis for the financial adviser's confirmation and details of the due diligence steps taken by the financial adviser (including but not limited to a list of the documents that it has reviewed) in satisfying itself that sufficient financial resources are and will be available; and
- (iii) confirming, where relevant, that no subjective conditions are attached to the financing.

The financial adviser is not expected to provide the Executive with copies of related loan documentation or other relevant documents, such as bank facility letters relating to the cash required, unless requested to do so by the Executive. The Executive should be consulted at the earliest opportunity in cases of difficulty.

The Executive reminds market practitioners that it is the sole responsibility of financial advisers to ensure sufficient financial resources are available to satisfy an offeror's obligations in respect of an offer. The provision of the financial resources' confirmation and/or any other related documents to the Executive will not absolve a financial adviser's responsibility in this respect. Financial advisers should observe the highest standard of care to satisfy themselves of the sufficiency of financial resources.

Practice Note 15 has been revised to reflect the above and can be found on the Practice Note page of the Takeovers and Mergers section of the SFC website at www.sfc.hk.

Reminder: Maintain proper compliance and monitoring systems

The Executive would like to take this opportunity to remind financial advisers of the importance of maintaining proper compliance and monitoring systems to ensure compliance with the Codes.

One of the most fundamental principles of the Codes is encompassed in General Principle 1, which provides that in an offer, all shareholders are to be treated even-handedly and all shareholders of the same class are to be treated similarly. For this reason, during an offer period, the Codes impose certain prohibitions, restrictions and obligations on dealings by parties involved in an offer and persons acting in concert with them.

Under class (5) of the definition of acting in concert, financial and other professional advisers to corporate clients are presumed to be acting in concert with those clients. Class (5) provides as follows:

"a financial or other professional adviser (including a stockbroker) [is presumed to be acting in concert] with its client in respect of the shareholdings of the adviser and persons controlling, controlled by or under the same control as the adviser (except in the capacity of an exempt principal trader);"*

* Added for clarity

Where an adviser is part of a multi-service organisation, the presumption of acting in concert extends to all entities within that group, including its fund managers and principal traders (connected fund managers and principal traders) unless exempt status has been granted as described in Practice Note 9. Given this presumption, dealings in relevant securities during an offer period by connected fund managers and principal traders may have serious implications under the Codes. By way of example normally purchases by an offeror or its concert parties at above the offer price for a cash offer will result in that offer being increased to the highest price paid or, in the case of a securities exchange offer, purchases for cash will result in the offer being accompanied by a full cash alternative, again at the highest price paid.

The Executive has noted, on a number of occasions, that certain entities within a financial adviser's group have encountered difficulties in complying with the dealing restrictions and disclosure provisions imposed by Rule 21 and Rule 22 of the Takeovers Code. Most of these difficulties were primarily attributable to human error and avoidable. These included an oversight in updating a list of restricted dealings, a trader overlooking a trading restriction alert and miscommunication between different departments of the group.

In view of the potential serious consequences of dealings by connected parties under the Codes, the Executive wishes to remind financial advisers of the importance of maintaining proper compliance and monitoring systems to ensure compliance with the Codes (including but not limited to Rules 21 and 22). This must include the provision of proper and adequate training to all relevant personnel so that they are conversant with the requirements set out in Rules 21 and 22 and any other provisions of the Takeovers Code that might be relevant during an offer. Failure to comply with the provisions of the Codes may result in the Executive taking action including but not limited to disciplinary action.

Finally the Executive wishes to remind multi-service financial groups, which are involved in corporate finance activities and Code transactions, of the benefits of exempt status and the importance of making an application at the earliest opportunity.

Consultation on proposal to extend the application of the Codes to SFC-authorized REITs and related amendments

On 8 January 2010 the SFC issued a consultation paper on, among other things, a proposal to extend the application of the Codes to real estate investment trusts (REITs) and related amendments to the Codes and the Code on Real Estate Investment Trusts (the REIT Code).

The Codes currently apply to public companies in Hong Kong and companies with a primary listing of their equity securities in Hong Kong. They do not apply to REITs that are legally constituted in the form of trusts. It is proposed that the general principles and regulations for takeovers and mergers of listed companies as enshrined in the Codes should be equally applicable to similar activities concerning REITs. This will be subject to certain amendments to the REIT Code that largely aim at aligning the control structure of REITs with that of listed companies in Hong Kong. The SFC believes that the protection and safeguards under the Codes and the market standards and practices that have built up around the Codes will help ensure that minority unitholders would be treated even-handedly in a takeover situation.

The proposed amendments to the Codes include: (i) possible related changes to section 4.1 of the Introduction to the Codes to extend the application of the Codes to REITs; and (ii) the introduction of a REIT Guidance Note (new Schedule IX) to the Schedules of the Codes.

The consultation period ended on 8 March 2010. The SFC is studying the responses and will issue a consultation conclusions paper in due course.

Reappointment of members to the Takeovers and Mergers Panel and related committees

We welcome the reappointment of members to the Takeovers and Mergers Panel (the Panel), the Takeovers Appeal Committee (the Appeal Committee), the Nominations Committee and the Disciplinary Chair Committee with effect from 1 April 2010.

We wish to thank Mr Slevin Francis Joseph and Dr Kwok Chi Piu, Bill who have stepped down, for their valuable contributions over the years.

Set out below is a membership list of the Panel, the Appeal Committee, the Nominations Committee and the Disciplinary Chair Committee for the term until 31 March 2012 (unless otherwise stated).

Panel

The Panel hears disciplinary matters in the first instance, reviews rulings by the Executive at the request of any party dissatisfied with such a ruling and considers novel, important or difficult cases referred to it by the Executive. It also reviews, upon request by the SFC, the provisions of the Codes and the Rules of Procedure for hearings under the Codes and recommends appropriate amendments to the Codes and Rules to the SFC.

Chairman

Mr Clark Stephen Edward*

Deputy Chairmen

Mr Graham David

Ms Ko, Teresa Yuk Yin, JP

Mr Liu Chee Ming

Mr Maguire John Martin

Members

Mr Chan Yuk Sing, Freeman

Ms Charlton Julia Frances

Mr Denny Roger Michael *

Ms Desai Kalpana

Mr Ip Koon Wing, Ernest *

Mr Kwok Tun Ho, Chester

Mrs Lee Pui Ling, Angelina, JP

Mr Liu Che Ning

Mr Liu Swee Long, Michael

Mr Liu Yun Bonn *

Mr Lung Hak Kau, Karl

Mr Nesbitt Gavin Paul

Mr Norris Nicholas Andrew

Mr Rodgers Daniel James *

Mr Sabine Martin Nevil

Ms Tan Siew Boi, May

Mr Tortoisshell Andrew *

Mr Webb David Michael

Mr Winter Richard David

Ms Wong Oi Ming, Christine
Mr Yeh V-Nee
Ms Yu Ka Po, Benita

* appointed on 1 April 2009 for a term of two years until 31 March 2011

Appeal Committee

The Appeal Committee reviews disciplinary rulings of the Panel for the sole purpose of determining whether any sanction imposed by the Panel is unfair or excessive. It comprises a Chairman who is a member of the Disciplinary Chair Committee and other members of the Panel who are selected on a case-by-case basis.

Nominations Committee

The Nominations Committee nominates members of the Panel, the Appeal Committee and the Disciplinary Chair Committee.

Ex officio members

Mr Wheatley Martin, JP (Chairman)
Mr Clark Stephen Edward
Mr Ho Yin Tung, Brian

Members

Dr Fong Ching, Eddy, GBS, JP
Mr Kwok Hing Wai, Kenneth, BBS, SC

Alternate members to Clark Stephen Edward

Mr Graham David
Ms Ko, Teresa Yuk Yin, JP
Mr Liu Chee Ming
Mr Maguire John Martin

Disciplinary Chair Committee

Members are nominated by the Nominations Committee on the basis that they are duly experienced Senior Counsel. Their role is to act as Chairman of the Panel in disciplinary proceedings under the Codes or of the Appeal Committee on a case-by-case basis.

Mr Chan Kin Keung, Anthony, SC
Mr Chan King Sang, Edward, SC
Mr Chow Ka Ming, Anderson, SC
Mr Ho Ambrose, SC
Ms Li Gladys Veronica, SC
Mr Ng Kar Fai, Peter, SC
Mr Wong Yuk Lun, Horace, SC

A full list of members of the Panel, the Appeal Committee, the Nominations Committee and the Disciplinary Chair Committee can be found in the "Prospectuses, Takeovers & Mergers" – "Takeovers and Mergers" – "Takeovers Panel & Appeal Committee" section of the SFC website.

The Takeovers Bulletin is available under
'Speeches, Publications & Consultations' –
'Publications' of the SFC website at <http://www.sfc.hk>.

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