

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

Season's Greetings

The Executive wishes all our readers a healthy and happy 2014!!

Disciplinary proceedings against Chow Yei Ching and others for alleged breach of Takeovers Code

On 20 November 2013, the Executive commenced disciplinary proceedings before the Takeovers and Mergers Panel (Takeovers Panel) against the chairman of Chevalier Group, Mr Chow Yei Ching; his son, Mr Oscar Chow Vee Tsung, and Mr Joseph Leung Wing Kong over a serious breach of the Takeovers Code.

The Executive alleges that the three actively co-operated to assist the late Ms Nina Kung to obtain or consolidate control of ENM Holdings Limited (ENM) and avoid the triggering of a mandatory general offer under the Takeovers Code.

At the relevant time, Ms Kung was the largest shareholder of ENM. She was also the chairwoman and the sole beneficial owner of the Chinachem Group.

Mr Chow, his son, and Mr Leung were closely connected to Ms Kung. Mr Chow had known Ms Kung as a close friend and business partner with numerous commercial dealings for more than 40 years. Mr Oscar Chow is alleged to have acted in concert with his father under the Takeovers Code. Mr Leung was a trusted friend and close business associate of Ms Kung. He has been working at the Chinachem Group as a director since April 1987.

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Between 2000 and 2002, Mr Chow acquired a total of 160 million shares of ENM (approximately 9.69% of ENM's issued share capital) on Ms Kung's behalf and at her request. Mr Chow paid for the purchase of the ENM shares and was subsequently reimbursed by Ms Kung. The reimbursement was handled by Mr Oscar Chow and Mr Leung.

Mr Chow held the ENM shares under four British Virgin Island (BVI) companies he owned through the issuance of bearer shares until December 2009. To comply with the changes to BVI law requiring greater transparency in the ownership of bearer shares, Mr Chow arranged for the ownership of the 160 million ENM shares to be split equally between one of his daughters and Mr Oscar Chow in December 2009.

The Takeovers Code treats persons acting in concert as being the equivalent of a single person and aggregates their shareholdings. Mr Chow's acquisitions increased the collective shareholding of the concert group in ENM from 34.64% to 44.33%, thereby triggering a mandatory general offer obligation under the Takeovers Code¹. However, none of the share acquisitions in ENM by Mr Chow on Ms Kung's behalf were publicly disclosed and remained undisclosed for a protracted period.

This type of arrangement, which is commonly known as "warehousing", enabled Ms Kung to secretly hold the ENM shares and avoid an obligation under the Takeovers Code to make a general offer. In consequence ENM shareholders were deprived of their fundamental right to receive a general offer to buy their shares.

Mr Chow brought the matter to the Executive's attention after receiving a letter in late April 2012 from the joint administrators of Ms Kung's estate making enquiries about shares of ENM that belonged to the estate.

The disciplinary proceedings before the Takeovers Panel will be held in public. Details of the proceedings can be found in the "Regulatory functions – Listings & takeovers – Takeovers & Mergers – Disciplinary proceedings before the Takeovers and Mergers Panel" section on the SFC website.

Disciplinary action against Daqing Dairy and its directors

On 27 November 2013, the Executive publicly censured Daqing Dairy Holdings Limited (Daqing Dairy) and its directors, Mr Wang De Lin and Mr Stephen Chiang Chi Kin for breaching Rule 8.4 of the Takeovers Code. The Executive also imposed a cold shoulder order denying Mr Wang direct or indirect access to the Hong Kong securities markets for 24 months until 27 November 2015.

At all material times Mr Wang and Mr Chiang were respectively Daqing Dairy's only executive director and only independent non-executive director.

On 18 April 2013, Daqing Dairy announced jointly with Radiant State Limited (Offeror) that the Offeror had acquired a 52.16% interest in Daqing Dairy from its former controlling shareholder and that the Offeror would make a general offer for the shares in Daqing Dairy pursuant to Rule 26.1 of the Takeovers Code. The Offeror posted an offer document to shareholders on 7 June 2013.

Despite repeated requests by the Executive to do so, Daqing Dairy and its directors failed to issue an offeree board circular to shareholders in respect of the general offer as required under Rule 8.4 of the Takeovers Code.

¹ Rule 26.1 of the Takeovers Code in force in December 2000 required a mandatory general offer to be made for all the shares in the company if a person or group of persons acting in concert acquired shares resulting in either:

- (i) the person or concert group collectively holding 35% or more of the voting rights (known as the "trigger"). The trigger threshold was reduced to 30% on 19 October 2001; or
- (ii) the person or concert group collectively holding between 35% and 50% of the shares and then going on to acquire, either individually or as a group, more than 5% in any 12 month period (known as the "creeper"). The creeper threshold was reduced to 2% on 19 October 2001.

The failure to despatch the offeree board circular within the time prescribed in Rule 8.4 prejudiced the interests of Daqing Dairy shareholders as well as the investing public. As Daqing Dairy failed to provide its shareholders with its latest corporate and financial information, the board's recommendation and the advice of an independent financial adviser with respect to the general offer as required by the Takeovers Code, shareholders were unable to reach a properly informed decision on the general offer as envisaged by the Takeovers Code.

Daqing Dairy, Mr Wang and Mr Chiang accept that they have breached Rule 8.4 and have agreed to the disciplinary action against them under section 12.3 of the Introduction to the Takeovers Code. Their failure to issue a circular in accordance with Rule 8.4 of the Takeovers Code constitutes a breach of a fundamental provision of the Takeovers Code.

The Executive imposed severer sanctions against Mr Wang than the other two parties to reflect his overall role in causing the breach of Rule 8.4 of the Takeovers Code. At all relevant times, Mr Wang was the only executive director of Daqing Dairy. He had a clear responsibility to ensure that Daqing Dairy fully complied with the Takeovers Code.

The sanction against Mr Chiang, the only independent non-executive director of Daqing Dairy, reflects his role in the breach and the fact that he failed to take sufficient action to ensure that the offeree board circular was issued in compliance with Rule 8.4.

The Executive takes 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. If they do not, they may find by way of sanction, that the facilities of such markets are withheld in order to protect those who participate in Hong Kong's securities markets.

The Executive Statement dated 27 November 2013 can be found in "Regulatory functions – Listings & takeovers – Takeovers & Mergers – Decisions & statements – Executive decisions and statements" section on the SFC website, and the cold shoulder order in "Regulatory functions – Listings & takeovers – Takeovers & Mergers – Decisions & statements – Current cold shoulder orders" section on the SFC website.

Update on Asia Pacific Takeovers Regulators Forum

The Executive is pleased to announce the new look for the Asia Pacific Takeovers Regulators Forum which was launched on 6 November 2012. The Forum (www.takeoversforum.com) is an e-platform jointly set up and hosted by the Securities Commission Malaysia and the Securities and Futures Commission (SFC).

The Forum is designed to facilitate the exchange of ideas and views regarding takeovers and related matters among regulators in the Asia-Pacific region. Membership is open to takeovers regulators only. It also provides the public with access to information about takeovers regulations of member countries and related news. It is intended that further resources will be built up over time.

We welcome any feedback or suggestion from the public about the Forum and the type of information that you wish to be included. Feedback and suggestions should be sent to "takeoversforum@seccom.com.my".

In addition to the Securities Commission Malaysia and the SFC, the following eight takeovers regulators in the Asia-Pacific region have signed up as members: the Australian Securities and Investments Commission; the Takeovers Panel, Australia; the China Securities Regulatory Commission; the Securities and Exchange Board of India; the New Zealand Takeovers Panel; the Securities and Exchange Commission of Pakistan; the Monetary Authority of Singapore; and the Securities and Exchange Commission of Thailand.

Quarterly update on the activities of the Takeovers Team

In the three months ended 30 September 2013, the Executive received seven takeovers-related cases (including privatisations, voluntary and mandatory general offers and off-market and general-offer repurchases), four whitewashes and 45 ruling applications.

All issues of the *Takeovers Bulletin* are available under 'Published resources – Industry-related publications – *Takeovers Bulletin*' on the SFC website at www.sfc.hk.

Feedback and comments are welcome and can be sent to takeoversbulletin@sfc.hk.

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