

Practice Note 5 (PN 5): Post-vetting of certain documents under Rule 12.1

1. Rule 12.1 of the Takeovers Code was amended on 25 June 2010 to provide that *“[a]ll documents (**other than those referred to in the Note to Rule 12.1 below**) must be filed with the Executive for comment prior to release or publication and must not be released or published until the Executive has confirmed that it has no further comments thereon...”* (emphasis added to highlight the relevant changes)
2. “Document” is defined in the Codes to include *“any **announcement**, advertisement or document issued or published by any party to an offer or possible offer in connection with such offer or possible offer other than documents required to be put on display under Notes 1 and 2 to Rule 8 of the Takeovers Code...”* (emphasis added)
3. Note to Rule 12.1 further provides, among other things, that the Executive will from time to time publish a list of documents that will not normally be regarded as subject to Rule 12.1 and therefore will not be required to be submitted to the Executive for comment prior to release or publication (**Post-Vet List**). This List can be found in the “Takeovers and mergers” section of the SFC website at www.sfc.hk.
4. The purpose of this Practice Note is to provide guidance to parties and their advisers in respect of announcements appearing in the Post-Vet List.

Commenting process under the Codes

5. As stated in Rule 12.1, the Executive will not normally comment on drafts of announcements set out in the Post-Vet List. This change recognises the routine nature of such announcements and serves to reduce the cost and burden of compliance for relevant parties and their advisers.
6. For the avoidance of doubt, any “document” that is not specified in the Post-Vet List (for example, a circular or an announcement issued under Rule 3 of the Takeovers Code) is still required to be submitted to the Executive for comment before publication in accordance with Rule 12.1.
7. In addition, if an announcement in the Post-Vet List contains additional information relating to other material matters or

Code provisions (such as issues relating to profit forecasts or valuations) the announcement would not be considered as falling within the Post-Vet List for the purposes of the Note to Rule 12.1. The relevant announcement would, therefore, be required to be submitted to the Executive for comment under Rule 12.1 of the Takeovers Code before its publication. Parties and their advisers must consult the Executive at the earliest opportunity if there is any doubt as to whether an announcement qualifies for post-vetting (see Note 2 to Rule 12 of the Takeovers Code).

Post-publication review and follow-up action

8. The Note to Rule 12.1 requires that a published version of the document (i.e. the document which qualifies for post-vetting) must be filed with the Executive immediately after the document is published.
9. The Executive will review the relevant announcement after publication and make appropriate enquiries where necessary. Parties and their advisers are expected to respond promptly to any follow-up enquiries made by the Executive and provide all necessary information (see General Principle 10). A party and/or its advisers should make every effort to resolve an issue once it has been raised which may include the need to publish a supplementary disclosure or clarification announcement.
10. Notwithstanding the exemptions mentioned in paragraph 1 above, the Executive may, where it considers it necessary or appropriate, require a party and/or its advisers to submit drafts of documents which appear in the Post-Vet List for review prior to publication.

Guidance on contents of announcements in the Post-Vet List

11. All documents issued under the Codes must include a responsibility statement as required by Rule 9.3 of the Takeovers Code. This includes announcements that appear in the Post-Vet List. Any proposed modification or change to the responsibility statement, including the exclusion of directors under Rule 9.4, is subject to the Executive's prior consent.
12. Guidance is set out below on specific information that will normally be required in respect of each announcement set out in the Post-Vet List. Where the Codes prescribe specific

disclosure to be made, parties and/or their advisers are reminded that they are expected to exercise due diligence to ensure that the required information is fully disclosed in the announcement. In case of doubt the Executive should be consulted at the earliest opportunity.

a) Announcements of the appointment of independent financial advisers under Rule 2.1

Rule 2.1 requires that “[t]he board must announce the appointment of the independent financial adviser in the initial announcement of the offer or possible offer, or as soon thereafter as the appointment is made.” Rule 2.6 further sets out persons not regarded to be suitable to give independence advice. If there is any doubt regarding compliance with Rule 2.1 and Rule 2.6 parties are encouraged to consult the Executive before the appointment is made and announced. In the event that, following an announcement of its appointment as independent financial adviser, an adviser is considered not suitable to give independent advice a further announcement of a change of independent financial adviser would be required.

b) Announcements of the despatch of circulars under Rule 8 or Rule 25

Typically an announcement informing shareholders of the despatch of a circular under the Codes will be made on or before the date of despatch. In cases where the parties wish to reproduce certain information such as the timetable, recommendation of the independent board committee and/or the independent financial adviser in the despatch announcement, they should take all appropriate care to ensure that such information is properly and accurately extracted from the relevant circular and no additional or new information is included in the announcement. Parties should also submit evidence about the date of despatch in accordance with Note 4 to Rule 8.

c) Announcements of delay in the despatch of circulars under Rule 8.2 or Rule 8.4

Under Rule 8.2 or Rule 8.4, the Executive’s consent is required if the offer document, composite document or

the offeree board circular cannot be posted within the prescribed period. Rule 8.4 further provides that the Executive's consent will be given only if the offeror agrees to an extension of the first closing date by the number of days in respect of which the delay in the posting of the offeree board circular is agreed. In this connection, parties and their advisers should submit the consent application before the relevant announcement is issued. If it is not possible to obtain a formal written ruling in advance, the Executive's indicative view on the period of extension must be sought in advance of publication of the relevant announcement. The announcement normally should contain a confirmation (i) that the Executive has granted consent to the delay in despatch; or (ii) that an application for consent has been or will be made to the Executive and the Executive has indicated that it is minded to grant consent; and (iii) the expected date of despatch and the reasons for the delay. Such announcement should be published on or before the original despatch date required by Rule 8.2 or Rule 8.4.

d) Announcements of the appointment and resignation of directors of the offeree company under Rule 26.4 and Rule 7

Rule 7 restricts the earliest time the directors of an offeree company may resign except with the consent of the Executive. Rule 26.4 restricts the earliest time that a nominee of an offeror or person acting in concert with it may be appointed to the board of the offeree company except with the consent of the Executive. It follows that where relevant the Executive's consent must be obtained before publication of the announcement.

e) Announcements of placing and top-up transactions under Note 6 on dispensations from Rule 26

Note 6 on dispensations from Rule 26 provides that “[a] waiver from the obligation to make a general offer under this Rule 26 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. Such a waiver is required even if the placing and top-up are to be effected simultaneously whether by way of placing and subscription agreements that are inter-conditional or otherwise...”

Normally a straightforward placing and top-up involves the relevant parties entering into a placing and subscription agreement relating to:

- (i) the placing of existing shares to independent persons; and
- (ii) a subscription by the placing shareholder(s) for new shares up to the number of shares placed.

Only announcements relating to straightforward placing and top-up transactions will qualify for the Post-Vet List. Where a placing and top-up transaction involves other arrangements or agreements, which may or may not be contained in the placing and subscription agreement(s), the Executive must be consulted in advance of publication of the placing and top-up announcement. For example, a placing and top-up involving a buy-back arrangement between the placing shareholder(s) and the placees would not be considered as falling within the Post-Vet List. In all cases of doubt parties should consult the Executive at the earliest opportunity.

In practice the Executive would expect a placing and top-up announcement to contain the following information:

- (i) the terms of the placing and top-up transaction;
- (ii) a statement that the placees and their ultimate beneficial owners are or will be (if not yet procured) independent of and not acting in concert with the placing shareholder(s);
- (iii) a statement confirming that the condition precedent relating to the granting of a waiver by the Executive under Note 6 on dispensations from Rule 26 cannot be waived by the placing shareholder(s). The Executive should be consulted in advance if such a condition is waivable; and

- (iv) a statement that an application will be or has been made by the placing shareholder(s) to the Executive for a waiver under Note 6 on dispensations from Rule 26.

Note 6 on dispensations from Rule 26 provides guidance as to the circumstances in which the Executive would normally waive the obligation under Rule 26 for a placing and top-up transaction. It is the responsibility of the relevant financial adviser, placing agent and acquirer of the voting rights to ensure and confirm the independence of placees as soon as practicable. It should be noted that in the event that the Executive does not grant a waiver under Note 6 on dispensations from Rule 26 and the top-up transaction proceeds as proposed a mandatory general offer obligation under Rule 26 would be triggered. Please also refer to Note 7 on dispensations from Rule 26 (as amended in March 2012).

(f) Announcements of numbers of relevant securities in issue under Rule 3.8

When an offer period begins, Rule 3.8 requires an offeree company to announce, as soon as possible, details of all classes of relevant securities issued by it, together with the number of such securities in issue. An offeror or a potential named offeror must also announce the same details of its relevant securities unless it is stated that the offer is likely to be solely in cash. Rule 3.8 further requires that if any previously announced information changes during an offer period, a revised announcement must be made as soon as possible.

Where the number of relevant securities in issue changes during an offer period as a result of events, such as exercise of share options or warrants, conversion of convertible securities, or their lapse, cancellation or expiry, the Executive would expect the following to be disclosed (i) the event that led to the change in the number of relevant securities; (ii) the number of relevant securities involved (e.g. number of relevant securities newly issued or lapsed); and (iii) the up-to-date position of each class of relevant securities immediately following the relevant event.

(g) **Announcements of final completion of issue of new securities for whitewash transactions under paragraph 6 of Schedule VI**

Paragraph 6 of Schedule VI of the Takeovers Code sets out scenarios where announcements must be made following shareholders' approval of a proposed whitewash transaction. This includes the requirement to make an announcement where the final controlling holding of voting rights is dependent on the results of an underwriting.

In addition it is common practice for companies undertaking whitewash transactions which involve the subscription and issue of new securities but no underwriting arrangements to issue an announcement upon completion of the subscription¹ to confirm the resulting final shareholding position.

The following standard disclosure should be made in a final completion announcement: (i) date of completion of the whitewash transaction; (ii) shareholding of the controlling shareholder and its concert parties immediately before completion of the issue of new securities; (iii) final shareholding of the controlling shareholder and its concert parties after completion of the issue of new securities; (iv) where convertible securities, options, warrants or other subscription rights are involved, the maximum potential shareholding of the controlling shareholder and its concert parties assuming immediate conversion in full.

Responsibility for documents

13. The Executive would like to remind parties and their advisers who are involved in Code transactions about Note 2 to Rule 12 of the Takeovers Code which provides that:

“The Executive’s role in the commenting process is no more than a consulting role where the Executive provides

¹ In a whitewash transaction that involves the issue of convertible securities to a whitewash applicant, the Executive interprets “completion of subscription” to mean the completion of the issue of the convertible securities to the whitewash waiver applicant, and not when the conversion rights are exercised. Please refer to September 2010 Issue No. 14 of the Takeovers Bulletin.

assistance in resolving any Code issues raised by the Executive or identified by the parties and their advisers. It is the sole responsibility of the issuer of the document (and its directors and advisers) to ensure that the Codes are fully complied with.

Where the Rules prescribe specific disclosure to be made parties and their advisers are expected to exercise due diligence to ensure that the required information is fully disclosed in the first draft document submitted to the Executive for comment under Rule 12.1.

Most importantly, parties and their advisers should not be under the misconception that by expressing that it has no further comment on a draft document the Executive is confirming that the document fully complies with the Codes. The Executive will not verify the accuracy of statements made in documents submitted for comment. If it subsequently becomes apparent that any statement was incorrect, or any document was incomplete, the Executive may require an immediate correction to be issued in addition to considering any possible disciplinary action in accordance with the Codes.

Parties and their advisers must consult the Executive at the earliest opportunity if there is any doubt as to whether a document qualifies for post-vetting.”

14. Finally, parties who issue Code related announcements and documents should be aware of possible criminal liability arising under Section 384 of the Securities and Futures Ordinance (Cap. 571) for any false or misleading information contained in such announcements and documents.

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