

Introduction

1. In this issue of the Takeovers Bulletin, you will find three Practice Notes that clarify the application of certain provisions of the Codes relating to the gathering of irrevocable commitments, timing of disclosure of shareholdings of financial advisers in the offeree company and the meaning of "reporting on in accordance with Rule 10".
2. There is a summary of the Takeovers Panel's recent decision to waive the requirement for a cash alternative offer in the privatisation of CITIC International Financial Holdings Limited.
3. We are also pleased to announce the appointment of members to the Disciplinary Chair Committee.
4. Finally, the Executive will normally communicate its comments on documents submitted under Rule 12.1 of the Takeovers Code by fax, as opposed to marking up on the document itself. The new arrangement will undergo a six-month trial period starting from 1 September 2008.

Practice Note 12 (PN12) – Gathering of irrevocable commitments

Note 4 to Rules 3.1, 3.2 and 3.3 provides that "[a]n offeror may approach a very restricted number of sophisticated investors who have a controlling shareholding to obtain an irrevocable commitment. . . . In appropriate circumstances, the Executive may permit particular shareholders to be called and informed of details of a proposed offer which has not been publicly announced. . . .".

The Executive has been consulted on a number of occasions on the practicalities of this Note. In particular market practitioners have asked for clarification on the earliest time shareholders may be approached by an offeror and the number of shareholders who may be approached.

The rationale of Note 4 to Rules 3.1, 3.2 and 3.3 is to ensure equal dissemination of information to shareholders either

Highlights

- Practice Note 12 (PN12) – Gathering of irrevocable commitments
- Practice Note 13 (PN13) – Timing of disclosure of holdings by a group of which an adviser is a member
- Practice Note 14 (PN14) – Meaning of "reporting on in accordance with Rule 10"
- Takeovers Panel waived the cash alternative offer requirement in the privatisation of CITIC International Financial Holdings Limited
- Appointment of members to the Disciplinary Chair Committee
- Six-month trial period for communicating comments on documents by fax

during the course of an offer or when an offer is in contemplation (see General Principle 3 of the Codes). In administering this Note, the Executive takes into account an offeror's need for certainty as well as the risks of possible leakage of information and unequal dissemination of information. Where the Executive consents to an offeror approaching a restricted number of shareholders under Note 4, it would normally impose the following conditions:

- (a) Shareholders may only be approached within one day or within two days if they are overseas before the announcement of a firm intention to make an offer under Rule 3.5 of the Takeovers Code ("Rule 3.5 Announcement") is published.
- (b) Information that may be provided to such shareholders should be confined to details that would eventually be contained in the Rule 3.5 Announcement.
- (c) If shareholders are approached before an announcement of a possible offer is published, or in the event of a hostile bid, the total number of shareholders who may be approached is restricted to **six**. If an offer period has already commenced (e.g. following the issuance of an announcement of an offer or possible offer), there is normally no restriction on the number of shareholders who may be approached subject to them not being provided with any non-public information. Where the offer is recommended by the board of the offeree company, the Executive may adopt a more relaxed approach to the number of shareholders who may be approached.
- (d) Shareholders being approached will have to agree to be insiders, and therefore be subject to all the rules and regulations applicable to insiders. The potential offeror will need to show steps (e.g. obtaining signed confidentiality undertakings from the relevant shareholders) to be taken to prevent leakage of information relating to the offer.
- (e) The Executive should be consulted at the earliest opportunity. As part of the consultation the Executive would expect to be provided with a list of the shareholders to be approached.

Practice Note 13 (PN13) – Timing of disclosure of holdings by a group of which an adviser is a member

Rule 3.5 of the Takeovers Code requires that an announcement of a firm intention to make an offer must disclose details of the existing holding of voting rights and rights over shares in the offeree company owned or controlled or directed by any person acting in concert with the offeror. Under Class 5 of the presumption of acting in concert a financial or other professional adviser 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).

Note 1 to Rule 3.5 of the Takeovers Code acknowledges that for reasons of secrecy it would not be prudent to make enquiries (before the issue of the announcement) so as to include in an announcement details of any holdings or borrowings of offeree company shares or options or derivatives in respect of them held by or entered into by other parts of an adviser's group. The Note further provides that such details should be obtained as soon as possible after the announcement has been made and the Executive consulted. If the holdings or borrowings are significant, a further announcement will be required.

The Executive would like to clarify that for the purpose of this Note, details of the holdings or borrowings of offeree company shares or options or derivatives in respect of them held by or entered into by other parts of an adviser's group should be provided to the Executive (i) in the case of holdings held by entities in Hong Kong, by 5:00 p.m. on the first business day after publication of the Rule 3.5 announcement; and (ii) in the case of holdings by entities based overseas, by 5 p.m. on the second business day after publication of the Rule 3.5 announcement. This is in line with the requirement that all exempt principal traders must provide to the Executive details of the holdings or borrowings of their group in the relevant securities of the offeree company and in the case of securities exchange offer, the securities of the offeror, by 5 p.m. on the day after the offer period commences. The Executive will then consider whether a further announcement setting out such details will be required.

However, in cases where an announcement identifying the offeror or potential offeror and its adviser(s)' connection with such offeror has been published prior to the release of the announcement of a firm intention to make an offer under Rule 3.5, Note 1 to Rule 3.5 will not apply given secrecy will no longer be an issue. Accordingly, full disclosure of the details of the existing holdings and borrowings of the adviser's group must be made at the time of the announcement of the firm intention to make an offer in accordance with Rule 3.5 of the Takeovers Code.

Practice Note 14 (PN14) – Meaning of “reporting on in accordance with Rule 10 of the Takeovers Code”

Where a document to shareholders includes information that constitutes a profit forecast under Rule 10.6 of the Takeovers Code, then the information must be reported on in accordance with Rule 10 of the Takeovers Code. To clarify what is meant by “reporting on”, we draw your attention to Rule 10.1, Note 1(c) to Rules 10.1 and 10.2, and Rule 10.4 of the Takeovers Code.

Reporting on a profit forecast involves (i) the financial advisers reviewing and discussing the assumptions with their client in order to satisfy themselves that the forecast has been made with due care and consideration and confirming this in a letter to the Executive; and (ii) the auditors or accountants satisfying themselves that the forecast, so far as the accounting policies and calculations are concerned, has been properly compiled on the basis of the assumptions made and confirming this in a letter to the Executive. The abovementioned confirmation letters from the financial advisers and the auditors/accountants form the report referred to in Rule 10.4 of the Takeovers Code and must be lodged with the Executive at the time the forecast is made and published in the same document containing the profit forecast or if the profit forecast is made in an announcement, then the report must be published in the next document issued by the company to shareholders.

There may be occasions, particularly when an estimate relates to a period already ended, when no assumptions are required as provided under Note 2(c) to Rule 10.1 and 10.2 of the Takeovers Code. For the avoidance of doubt, an estimate of profit for a period which has already expired should be treated as a profit forecast under Rule 10.6 (b). In these circumstances, instead of reviewing the assumptions, the financial advisers and auditors/accountants should review and report on the bases of the profit estimates.

Takeovers Panel waived the requirement for a cash alternative offer in the privatisation of CITIC International Financial Holdings Limited (CIFH)

On 30 July 2008, the SFC published the Panel's decision that a cash alternative offer would not be required in the proposed privatisation of CIFH as a result of acquisitions of shares in CIFH for cash by Lehman Brothers, the financial adviser to the offeror, during the offer period. The Panel exercised its discretion to waive the requirement under Rule 23.1(b) of the Takeovers Code due to, amongst other things, the insignificance of the size of the purchases and the negligible impact they had on the traded price and volume of shares and on public shareholders so that the even-handedness and equality of their treatment under the offer had not been compromised to any significant degree.

By way of background, CITIC Group announced a securities exchange offer (with a cash element) for CIFH on 3 June 2008 and as a result, the offer period commenced. Shortly after the resumption of trading upon the issue of the detailed announcement of the offer on 10 June 2008, Lehman Brothers purchased shares in CIFH for cash. Under Rule 23.1(b) of the Takeovers Code,

in a securities exchange offer, if the offeror or its concert parties purchased shares in the offeree company for cash during the offer period, then a cash alternative offer is required. The Panel ruled that a cash alternative offer is required but waived the obligation given the insignificance of the purchases and the negligible impact they had on shareholders.

The full Panel decision is available under "Takeover & Mergers" – "Panel and Executive Decisions / Statements" of the SFC website at www.sfc.hk.

The appointment of the Disciplinary Chair Committee members

On 1 August 2008 the SFC announced the appointment of the following members to the Disciplinary Chair Committee (DCC) for the period from 1 August 2008 to 31 March 2010:

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

The DCC is a new committee established under section 8(1) of the Securities and Futures Ordinance. The provision for its establishment was introduced into the Codes on 1 April 2008 as part of the review of the structure of the Panel and its procedures following consultation with the market and the Panel.

Members of the DCC, each of them a very experienced Senior Counsel in Hong Kong, were nominated by the Nominations Committee. Their role is to act as Chairman of the Panel in disciplinary proceedings under the Codes or of the Takeovers Appeal Committee on a case-by-case basis.

The SFC is confident that with their wealth of experience, these newly appointed members will ensure the smooth conduct of disciplinary proceedings under the Codes and thereby facilitate fair, efficient and timely proceedings.

Six-month trial period for communicating comments on documents by fax

For a six-month trial period starting from 1 September 2008, the Executive will normally communicate comments on documents submitted under Rule 12.1 of the Takeovers Code by fax. Previously, these comments were made by marking up on the document submitted to the Executive.

The Executive's comments can be divided broadly into two categories: (i) those relating to substantive Code issues; and (ii) those concerning disclosure requirements (including requests for clarification) of the Codes, such as those set out in the Schedules as well as Rules 3.5 and 19. We should like to draw attention to Note 2 to Rule 12 which provides that 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. The Executive does not verify the accuracy of statements made in documents submitted for comment.

During this trial period, if you have any comment or suggestion in respect of the commenting process, please contact the Executive.

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

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

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