

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 of the Takeovers Bulletin you will find a summary of the Takeovers Panel's recent decisions in relation to Wing Hang Bank and HAECO.
2. We remind market practitioners of the importance of early preparation for compliance with the profit forecast "reporting" requirements in Rule 10.4.
3. The six-month trial period for communicating comments on documents by fax ended on 28 February 2009 and, in view of feedback from market practitioners, the Executive has reverted to manuscript comments.
4. Finally, we take this opportunity to announce the appointment of the Chairman of the Takeovers and Mergers Panel and the appointments of new members of the Panel and the Takeovers Appeal Committee.

## Takeovers Panel's decisions relating to Wing Hang Bank, Limited (Wing Hang Bank) and Hong Kong Aircraft Engineering Company Limited (HAECO)

The Takeovers Panel met on two occasions in the second half of 2008 to consider matters referred to it by the Executive as there were particularly novel, important or difficult points at issue. The publication of the decisions was deferred to the first quarter of this year at the request of the parties due to the confidential and price-sensitive nature of the matter at the time.

Copies of the Panel's decisions can be found in the "Prospectuses, Takeovers & Mergers" – "Takeovers and Mergers" – "Panel and Executive Decisions / Statements" section of the SFC website at [www.sfc.hk](http://www.sfc.hk).

## Highlights

- Takeovers Panel's decisions in relation to Wing Hang Bank and HAECO
- Reminder about importance of early preparation for compliance with Rule 10.4
- Executive reverts to manuscript comments on documents following six-month trial period for communicating comments by fax
- New appointments to the Takeovers and Mergers Panel and the Takeovers Appeal Committee

## Wing Hang Bank

On 20 August 2008 the Panel ruled that proposed acquisitions by members of the Fung family of a 5% interest and by China Life Insurance Company Limited (China Life) of a 10% interest in Wing Hang Bank, from BNY International Financing Corporation (BNY), would give rise to an obligation on the part of the Fung family to make a mandatory general offer for Wing Hang Bank under Rule 26.1 of the Takeovers Code.

The decision was published on 24 February 2009.

The Fung family and BNY hold 23.58% and 20.28% in Wing Hang Bank respectively. They have had a close relationship for over 30 years and are bound by a shareholders' agreement which includes terms restricting the disposal of BNY's stake in Wing Hang Bank. BNY intended to dispose of its shareholding interest of 5% and 10% in Wing Hang Bank to the Fung family and China Life respectively. It was further proposed that the existing shareholders' agreement between the Fung family and BNY would be revised to include China Life as a new party with terms broadly similar to the existing agreement with some additional terms such as rights to nominate directors and rights of first refusal.

In all the circumstances the Panel regarded the Fung family and BNY as concert parties in respect of Wing Hang Bank. The Panel was also of the view that the intended disposal would result in the formation of a new concert party group led by the Fung family. By applying Note 1 to Rule 26.1 of the Takeovers Code the Panel ruled that the intended disposal, if completed, would give rise to an obligation to make a general offer for Wing Hang Bank by the Fung family.

Note 1 to Rule 26.1 provides that "[t]here may also be circumstances where there are changes in the make-up of a group acting in concert that effectively result in a new group being formed or the balance of the group being changed significantly. This may occur, for example, as a result of the sale of all or a substantial part of his shareholding by one member of a concert party group to other existing members or to another person."

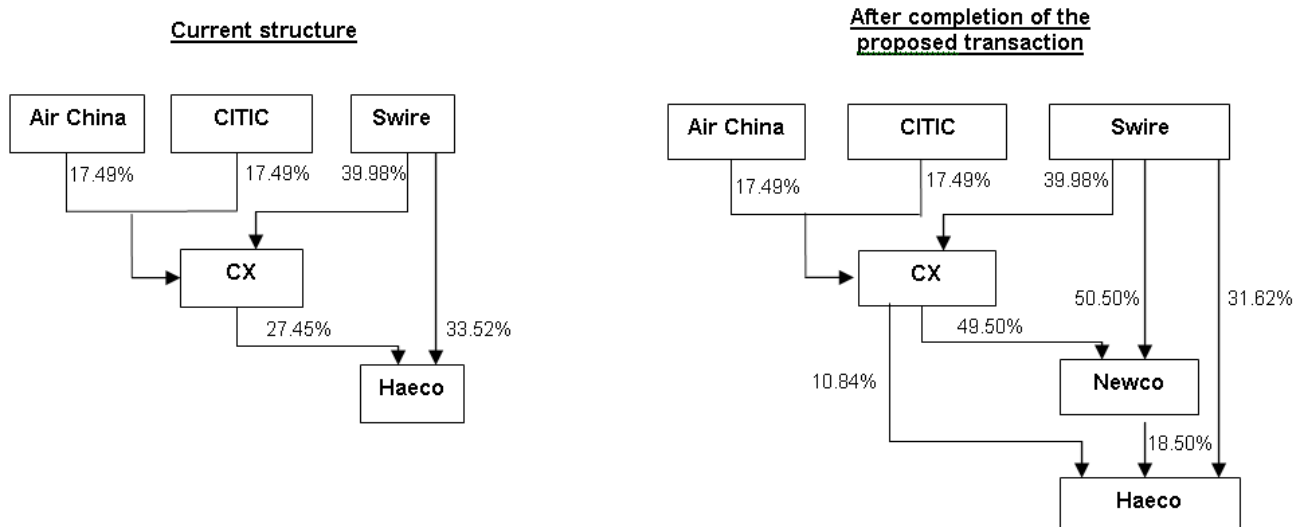
The Panel regarded BNY's proposed disposal of about 74% of its current holding (15% out of 20.28%) as substantial whilst at the same time China Life would become a 10% shareholder which, in the Panel's view, was also a significant minority position.

## HAECO

On 3 December 2008 the Panel ruled that if Swire Pacific Ltd (Swire) were to proceed with the possible acquisition of Cathay Pacific Airways Limited's (Cathay Pacific) shareholding interest of about 7.46% in HAECO in the manner proposed, it would incur an obligation to make a general offer for HAECO under Rule 26.1 of the Takeovers Code. The Panel also ruled that a waiver of any such mandatory offer obligation under Note 6(a) of Rule 26.1 of the Takeovers Code would not be available.

The decision was published on 19 January 2009.

By way of background, Swire proposed to acquire part of Cathay Pacific's shareholdings in HAECO through a subsidiary company to be established for this purpose and to restructure its own and Cathay Pacific's interests in HAECO. The proposed transaction would involve (i) the establishment of a special-purpose vehicle to be held 50.5% by Swire and 49.5% by Cathay Pacific; and (ii) Swire and Cathay Pacific transferring 1.9% and 16.6% of HAECO respectively, into the special purpose vehicle. The shareholding structures before and after the possible acquisition and restructure are as follows:



The Panel noted there was no question by presumption and in fact that Swire and Cathay Pacific are parties acting in concert in relation to HAECO. The Panel ruled that the proposed transaction, if implemented, would result in Swire's shareholding increasing from 33.52% to 50.12% (the relevant trigger point for Swire in relation to HAECO was 35%).

Under Note 6(a) to Rule 26.1 acquisitions by one member of a concert party from another which cause the purchaser's shareholding to cross a trigger point in the Takeovers Code "normally" result in a mandatory offer obligation arising. The Panel regarded this to be the starting point noting that the granting of any waiver is a concession.

The first two paragraphs of Note 6(a) to Rule 26.1 set out the criteria to be taken into consideration in the grant of a waiver. The second paragraph of Note 6(a) to Rule 26.1 provides that "*The Executive would normally grant the acquirer of such voting rights a waiver from such general offer obligation if:- (i) the acquirer is a member of a group of companies comprising a company and its subsidiaries and the acquirer has acquired the voting rights from another member of such group of companies; or...*"

As Cathay Pacific is not by definition a subsidiary of Swire the Panel ruled that the concession under the second paragraph of Note 6(a) to Rule 26.1 was not available.

The Panel went on to consider the criteria set out in the first paragraph of Note 6(a) to Rule 26.1. The criteria relate to whether there has been a change in the leadership of the concert group, whether the balance of shareholdings has changed significantly, the price paid for the shares acquired, and the relationship between the persons acting in concert and how long they have been so acting. Given (i) the proposed acquisition would result in a significant change in the balance of shareholdings within the concert group with Swire gaining statutory control of HAECO; and (ii) the price for the proposed acquisition would represent a substantial premium to the prevailing market price of HAECO, the Panel concluded that the criteria in the first paragraph of Note 6(a) to Rule 26.1 had not been met in full and, accordingly, that a waiver from a general offer obligation under the Takeovers Code should not be granted.

## Importance of early preparation for compliance with Rule 10.4

Profit forecasts made in relation to Code transactions may critically impact their outcome. Given the obvious hazards involved, Rule 10 of the Takeovers Code is designed to protect shareholders by regulating profit forecasts and other financial information

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during an offer period by requiring, amongst other things, a high degree of accuracy and fair presentation of forecasts. Rule 10 is an extension of General Principle 5 of the Codes, which provides that shareholders should be given sufficient information for them to reach an informed decision and that no relevant information should be withheld.

Rule 10.4 provides that *“Whenever a profit forecast is made during an offer period, the reports must be included in the document addressed to shareholders containing the forecast. When the forecast is made in a press announcement, that announcement must contain a statement that the forecast has been reported on in accordance with the Takeovers Code and the reports have been lodged with the Executive. If a company’s forecast is published first in a press announcement, it must be repeated in full, together with the reports, in the next document sent to shareholders by that company. The reports must be accompanied by a statement that those making them have given and not withdrawn their consent to publication.”*

The Executive has noted that some companies and their advisers appear to overlook the requirements in Rule 10.4. A shorter period of suspension of trading of the relevant securities pending the issue of an announcement containing a forecast may be possible if steps to fully comply with Rule 10.4 have been taken in advance. Therefore companies and their advisers should check at the outset whether Rule 10 is applicable so that the reporting procedures required by Rule 10 can be set in train with a minimum of delay. In cases of doubt, if a profit forecast or profit warranty is expected to be made in the initial announcement of the relevant transactions or in any announcement during an offer period, the Executive should be consulted at the earliest opportunity.

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## Executive reverts to manuscript comments on documents following six-month trial period for communicating comments by fax

The six-month trial period for communicating comments on documents submitted to the Executive for review under Rule 12.1 of the Takeovers Code by fax ended on 28 February 2009. Most of the feedback from market practitioners indicates that they generally prefer to receive comments marked in manuscript. In particular practitioners have noted they find that comments marked in manuscript on the actual document adjacent to the relevant section facilitate follow-up work. Practitioners have also noted that normally the Executive is able to provide comments marked in manuscript more speedily than those by fax. In view of this, the Executive has reverted to its previous practice of normally communicating comments by marking them up in manuscript on the actual document submitted for review unless circumstances require otherwise.

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## New appointments to the Takeovers and Mergers Panel and the Takeovers Appeal Committee

We welcome the appointment of Mr Stephen Clark as Chairman of the Takeovers and Mergers Panel for the period from 1 April 2009 to 31 March 2011. We also welcome the appointments of Messrs Roger Denny, Bonn Liu, Ernest Ip, Andrew Tortoisshell and Daniel Rodgers as new members of the Panel and the Takeovers Appeal Committee for the same period.

We wish to thank Messrs Henry Fan, Carlson Tong, Malcolm Brown, and Kenneth Willman 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 2010 (unless otherwise stated).

### **Takeovers and Mergers Panel**

Hears disciplinary matters in the first instance and reviews rulings by the Executive at the request of any party dissatisfied with such a ruling. Considers novel, important or difficult cases referred to it by the Executive. 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 \*
- Dr Kwok Chi Piu, Bill
- 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 Neville
- Mr Slevin Francis Joseph
- Ms Tan Siew Boi, May
- Mr Tortoishell Andrew \*
- Mr Webb David Michael
- Mr Winter Richard David
- Ms Wong Oi Ming, Christine
- Mr Yeh V-Nee
- Ms Yu Ka Po, Benita

\* 1 April 2009 to 31 March 2011

### **Takeovers 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. The Appeal Committee 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.

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## Nominations Committee

Nominates members of the Panel, the Appeal Committee and the Disciplinary Chair Committee.

### Ex officio Members

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

### Members

- Mr Fong Ching, Eddy, SBS, 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.

There has been no change to the membership of the Disciplinary Chair Committee which comprises the following members for the term until 31 March 2010.

- 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 Takeovers and Mergers Panel, the Takeovers 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 at [www.sfc.hk](http://www.sfc.hk).

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

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