

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

## Season's Greetings

We wish all our readers health and happiness in 2013!

## Asia Pacific Takeovers Regulators Forum

The Executive is pleased to announce the launch of Asia Pacific Takeovers Regulators Forum on 6 November 2012. The forum ([www.takeoversforum.com](http://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 is hoped that through the exchange of ideas and views, member regulators will be able to:

- promote and develop the transparent and fair conduct of takeovers activities in their own markets;
- learn from the experience of others to assist in the development of regulation in their countries;
- protect the public in their countries against financial losses arising from malpractices in takeovers.

The concept of the forum was first floated at the Inaugural Roundtable of Regional Takeovers Regulators Conference held in Kuala Lumpur, Malaysia, in May 2012.

The Executive believes that in today's increasingly interlocking financial markets, it is important that regulators exchange information regularly to facilitate industry development and adapt global standards to local situations. The Executive is pleased to help kick-start this forum and looks forward to active participation by fellow regulators.

## Highlights

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In addition to the Securities Commission Malaysia and the SFC, the following seven 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 Securities and Exchange Commission of Pakistan; the Monetary Authority of Singapore; and the Securities and Exchange Commission of Thailand.

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## Reconfirmation of financial resources at document stage

General Principle 4 of the Codes stipulates that an offeror and its financial advisers must be satisfied that the offeror can and will continue to be able to implement an announced offer in full. Rule 3.5 of the Takeovers Code provides that “[t]he announcement of an offer should include confirmation by the financial adviser or by another appropriate third party that resources are available to the offeror sufficient to satisfy full acceptance of the offer.”

In this regard, the Executive has reminded financial advisers on a number of occasions to observe the highest standard of care in confirming sufficiency of financial resources and provided guidance by way of Practice Note 15 (PN15) in December 2008 after consultation with the Takeovers Panel.

In addition, paragraph 11 of Schedule I of the Codes provides that “[w]here the offer consists of, or includes, cash or any other assets except new securities to be issued by the offeror company, the offer document must include confirmation by a financial adviser or by another appropriate independent party that resources are available to the offeror sufficient to satisfy full acceptance of the offer.”

As a matter of practice, the financial adviser to the offeror should provide the Executive with an updated signed confirmation of sufficiency of financial resources before the offer document is despatched to the shareholders of the offeree company. This confirmation may be in a similar form to the one provided to the Executive for the purpose of Rule 3.5.

PN15 has therefore been revised to include an additional paragraph to provide further guidance to market practitioners on what the Executive expects from the financial adviser to an offeror when reconfirming sufficiency of financial resources prior to the despatch of the offer document.

The revised PN15 can be found in the “Regulatory functions – Listings & takeovers – Takeovers & Mergers – Practice notes” section of the SFC site.

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## Vetting of “ancillary” documents

Rule 12.1 requires that all documents subject to the Codes (other than those in the Post-Vet List) 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. Under the Codes, the definition of “document” includes 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. In addition to offers, Rule 12.1 also applies to other Code transactions including privatisations by scheme of arrangement, whitewashes and share repurchases.

Quite often as part of a Code transaction, a party – usually a listed issuer – may need to issue ancillary documents other than documents issued under the Codes, in compliance with relevant requirements under the law and/or the Listing Rules. For example, a Hong Kong listed offeror may issue a possible conditional offer announcement under Rule 3.5 of the Takeovers Code on the basis that it obtains requisite shareholders’ approval before completing an acquisition of a controlling interest in the offeree company which will trigger a mandatory offer. The offeror will then be required under the Listing Rules to issue ancillary documents including announcement(s) and circular(s) to its own shareholders, in respect of the proposed acquisition and

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subsequent offer. The Executive has from time to time been asked whether such ancillary documents need to be submitted for the Executive's comment under Rule 12.1 on the basis that they may fall within the definition of "document" under the Codes.

Given that the ancillary documents should not include any new information relating to the Code transaction that has not already been published in accordance with the Codes, the Executive takes the following pragmatic approach:

- (i) If the relevant parties confirm to the Executive that the ancillary documents do not contain any material new information with Code implications, the Executive will not require such documents to be submitted for comment in accordance with Rule 12.1. In these circumstances, the Executive will not normally require a responsibility statement under Rule 9.3 of the Takeovers Code to be included in these documents.
- (ii) If, however, the ancillary documents contain material new information with Code implications, the parties should highlight the relevant pages that contain the new information and submit them to the Executive for its comment. If the new information is sufficiently material, the Executive may consider it necessary to comment on the entire document. The Executive may also require a responsibility statement under Rule 9.3 of the Takeovers Code to be included in the relevant document.

In all cases, if an ancillary document is to be published, parties and their advisers should consult the Executive at an early stage to help avoid unnecessary delay.

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## Changes to Takeovers-related committees

We welcome the appointment of Mr Carlson Tong, Chairman of the SFC, as a member of the Nominations Committee with effect from 1 November 2012.

We also take this opportunity to thank Mr Chan Kin Keung, Anthony, SC who has stepped down from the Disciplinary Chair Committee for his contribution to the work of the Committee.

A full list of members of the Takeovers Panel, the Appeal Committee, the Nominations Committee and the Disciplinary Chair Committee can be found in the "Regulatory functions – Listings & takeovers – Takeovers & Mergers – Takeovers Panel & related committees" section of the SFC site.

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## Quarterly update on the activities of the Takeovers Team

In the three months ended 30 September 2012, the Executive dealt with five takeovers-related cases (including privatisations, voluntary and mandatory general offers and off-market and general-offer repurchases) and six whitewashes. The Executive also received 44 ruling applications.

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The Takeovers Bulletin is available under 'Published resources' – 'Industry-related publications' of the SFC website at <http://www.sfc.hk>.

Feedback and comments are welcome and can be sent to [takeoversbulletin@sfc.hk](mailto:takeoversbulletin@sfc.hk).

If you want to receive the Takeovers Bulletin by email, simply register for the subscription service at <http://www.sfc.hk> and select Takeovers and mergers.

Securities and Futures Commission, 8/F Chater House,  
8 Connaught Road Central, Hong Kong

Phone : (852) 2840 9222

SFC website : [www.sfc.hk](http://www.sfc.hk)

E-mail : [enquiry@sfc.hk](mailto:enquiry@sfc.hk)

Fax : (852) 2521 7836

Media : (852) 2283 6860