

Change in commenting process regarding Schedule disclosure requirements under the Codes on Takeovers and Mergers and Buy-Backs ("Codes") and amendments to PN20

1. Rule 12.1 of the Takeovers Code provides that all "documents" (other than those appearing in the Post-Vet List) must be filed with the Executive for comment and must not be issued until the Executive has confirmed that it has no further comments in respect of them. The main purpose of Rule 12.1 is to facilitate the identification of Code issues before a document is published and to encourage early consultation with the Executive.
2. Parties and their advisers are reminded that the Executive's role in the commenting process is no more than a consulting role where the Executive provides 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 (see Note 2 to Rule 12 of the Takeovers Code).
3. Over the years the Executive has noted a marked over-reliance by issuers and their advisers on the commenting process with regards to the disclosure requirements set out in Schedules I, II, III and VI of the Codes ("Schedule disclosure requirements") in respect of documents that are to be despatched to shareholders pursuant to Rule 8 of the Takeovers Code ("shareholder's documents"). Shareholder's documents include offer documents, offeree board circulars, composite documents, whitewash circulars, share buy-back documents and scheme documents. In some cases, the sub-standard work on the part of advisers results in extensive and sometimes repeated comments by the Executive and an inevitable change of focus away from substantive Code issues. This leads to a lengthier commenting process and is inefficient.

Highlights

- Changes to commenting process on Schedule disclosure requirements and revised PN20
- Rule 22 Dealing Disclosure Online Submission system launched and new electronic dealing disclosure forms
- Quarterly update on the activities of the Takeovers Team

4. Given the clear prescriptive nature of the Schedule disclosure requirements the Executive has decided to redirect its comments back to substantive Code issues and away from Schedule disclosure requirements. This should make it clear that the responsibility for compliance with the Schedule disclosure requirements rests squarely with issuers of documents and their advisers and not the Executive. It is believed that this change of approach will help promote self-discipline among parties and market practitioners and assist compliance with the Codes. It should also help reduce the time taken to produce documents and reduce timetable concerns.
5. This new approach will commence on 1 July 2014 until further notice. The new regime will apply to all drafts of shareholder's documents submitted to the Executive for comment on or after 1 July 2014. It will not apply to documents in respect of which the commenting process has already started before 1 July 2014.
6. In going forward the Executive will review a draft shareholder's document and raise comments regarding substantive Code issues such as the requirements regarding profit forecasts and property valuations (see Rules 10 and 11 of the Takeovers Code) and seek clarification of statements where appropriate. The Executive will also continue to comment on the letter of advice from independent financial advisers and be available for consultation about any Code-related issues. The Executive will no longer raise comments about compliance with the Schedule disclosure requirements during the commenting process unless they also relate to substantive Code issues.
7. As ever a draft document should not be submitted to the Executive for comment unless it is in an advanced form. The Executive expects the document to comply fully with the Schedules disclosure requirements and to contain information which is up-to-date, true, accurate and complete. It is accepted that certain information may need to be updated at a later stage during the commenting process. In this case, clear reference to this need should be highlighted in the draft document. The Executive reserves the right to return a non-compliant document to the sender.
8. Notwithstanding the above, where the issuer of a document (or its directors or advisers) foresees any difficulty in meeting a Schedule disclosure requirement or has any doubt whether the disclosure fully meets a Schedule disclosure requirement, the Executive must be consulted at the earliest opportunity and be given a reasonable time to consider the matter before the due date for despatch of the document.

Post-publication review and follow-up action

9. Immediately after a document is posted to shareholders, the Executive must be provided with two hard copies and one electronic version of the published version of the document together with a publication confirmation and translation confirmation (see paragraph 21 of Practice Note 20 (PN 20)). PN 20 also sets out further materials that are also required to be provided to the Executive along with the published version of the document.
10. From 1 July 2014 when providing the Executive with copies of the published version of the shareholder's document, the issuer(s) of the document must provide the Executive with completed checklists of compliance with the relevant Schedule disclosure requirements in addition to the information set out in PN 20. The checklists must clearly mark the page number of the **published version** of the document against the relevant Schedule requirement evidencing compliance.
11. There will be no need to provide the Executive with checklists of compliance with the relevant Schedule disclosure requirements **prior** to publication of a shareholder's document. The responsibility for complying with the Schedule disclosure requirements will rest firmly with issuers of the documents and their advisers.
12. The Executive will review the relevant document primarily for Schedule compliance **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 clarification announcement or a supplementary document. The Executive also reserves its right to take further action in cases of non-compliance.

13. Notwithstanding the above, the Executive may, where it considers it necessary or appropriate, require a party and/or its advisers to submit checklists of Schedule disclosure compliance prior to publication of the shareholder's document.
14. PN 20 has been revised to reflect the new practice. We have also taken this opportunity to amend paragraph 14 of PN 20 to clarify when a negative statement is required. The revised PN 20 can be found in the "Regulatory functions – Listing & takeovers – Takeovers & mergers – Practice Notes" section of the SFC website.
15. 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.

Implementation of the new Rule 22 Dealing Disclosure Online Submission system and use of electronic disclosure forms

Under Rule 22 of the Takeovers Code, an offeror, offeree company or their respective associates (as defined under the Codes including holders of 5% or more of a class of relevant security) are required to disclose their dealings in relevant securities of the offeree company (and the offeror as well in the case of a securities exchange offer) conducted for themselves, or on behalf of discretionary or non-discretionary clients, during an offer period using the prescribed forms on the SFC's website. In practice, relevant parties submit their Rule 22 dealing disclosures to the Executive by fax or email. Following review, the Executive posts all public disclosures received on the SFC's website.

To streamline the submission and posting process, on 30 May 2014 the SFC announced the launch of the new Rule 22 Dealing Disclosure Online Submission system and the introduction of the new more user-friendly electronic dealing disclosure forms. The changes aim to enhance efficiency and transparency through more timely dissemination of material information during an offer period.

Starting 1 July 2014, relevant parties must submit dealing disclosure forms using the new online system which can be accessed via the link "<https://www.sfc.hk/dealdisclosure/gateway/landing?locale=en>". The new electronic disclosure forms must be used with the new system. The contents of the new forms are substantially the same as the existing ones except that a number of predefined choices are made available. The revised prescribed forms can be accessed from the SFC homepage (under Home > Forms) or the "Regulatory functions - Listing & takeovers - Takeovers & mergers – Forms" section of the SFC website. A How to Use Guide for the new system is also available online on the Forms page.

To ensure that takeovers are conducted within an orderly framework, the Executive would like to emphasise the importance of timely and accurate disclosure of relevant information by relevant parties, including associates. This is in line with General Principle 6 of the Codes. It is hoped that the new Rule 22 Dealing Disclosure Online Submission system and the revamped forms will assist parties in discharging their obligations under the Codes in a timely and accurate manner.

The Executive therefore wishes to remind parties to an offer and their respective associates (including persons who hold 5% or more of a class of relevant security) once again to report their dealings in the offeree company (and the offeror as well in the case of a securities exchange offer) made by themselves, or for discretionary or non-discretionary clients, during an offer period. Parties should note under Note 5 to Rule 22 that the deadline for submitting dealing disclosures is 10.00 a.m. on the business day following the date of the transaction. In practice, where dealings have taken place on stock exchanges in the United States' time zone, the Executive has allowed an additional business day for disclosure of dealings, and disclosures are therefore expected to be made no later than 10.00 a.m. on the second business day (Hong Kong time) following the date of transaction. For example, if a dealing took place in New York on Monday (US time) the disclosure should be made no later than 10.00 a.m. on Wednesday (HK time).

Quarterly update on the activities of the Takeovers Team

In the three months ended 31 March 2014, the Executive received 11 takeovers-related cases (including privatisations, voluntary and mandatory general offers and off-market and general-offer share buy-backs), 11 whitewashes and 52 ruling applications.

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