

An SFC newsletter to help participants in Hong Kong's financial markets better understand the Codes on Takeovers and Mergers and Share Buy-backs

Feedback and comments:
takeoversbulletin@sfc.hk

Reminder about submission of Code documents to the Executive for pre-vetting

In a number of recent cases, issuers and advisers have overlooked the definition of "document" in the Codes and as a result have failed to submit draft announcements to us for comment prior to their release as required by Rule 12.1 of the Takeovers Code. At times they have also failed to comply with other disclosure requirements such as the inclusion of the requisite directors' responsibility statement under Rule 9.3 of the Takeovers Code and the resulting shareholding position. In some cases, clarification announcements had to be issued afterwards.

In order to raise awareness about the definition of "document" and other relevant Code requirements, we have recently written to all authorised representatives of listed companies in Hong Kong and approved persons of real estate investment trusts to remind them about the relevant Code provisions.

Issuers and their advisers should be aware that Rule 12.1 requires all "documents" (other than those referred to in the Post-Vet List under Note 1 to Rule 12.1) to 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.*" Rule 12.1 also applies to share buy-back transactions that are governed under the Share Buy-backs Code. 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 us which should help resolve any Code issues at any early stage. It remains the sole responsibility of a document's issuer (and its directors and advisers) to ensure full compliance with the Codes and any other applicable laws and regulations.

Highlights

- Submission of Code-related announcements and documents for pre-vetting
- Revisions to Practice Note 20 related to announcements and documents under the Codes
- Quarterly update on the activities of the Takeovers Team

“Document” is defined in the Codes to include any announcement, advertisement or document issued by a 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. It also includes any announcement, advertisement or document issued by any person in connection with a transaction:

- where a ruling is sought that no offer obligation arises;
- which is stated to be conditional on no such offer obligation arising; or
- which is stated to be conditional on a ruling being given that no such offer obligation arises.

Relevant announcements include “talks” announcements (ie, possible offer announcements or possible whitewash announcements) even at a very early stage in negotiations, announcements which state that a transaction is conditional on no general offer arising under the Takeovers Code, and announcements that relate to share buy-backs which fall within the ambit of the Share Buy-backs Code.

Certain routine announcements are not required to be submitted to us for pre-vetting as provided under Note 1 to Rule 12.1. A published version of the announcement (both in English and Chinese) must however be filed with us immediately after release. The types of announcement covered in the Post-Vet List and further guidance (Practice Note 5) can be found on the SFC website.

The obligation to file draft documents for comment applies to all issuers during a Code-related transaction, covering an offeror, potential offeror, the offeree company and a vendor or potential vendor of relevant shares.

At the outset of a transaction, issuers and advisers should carefully consider whether an announcement is a “document” for the purpose of the Codes and if so, should comply with Rule 12.1 and other requirements, including the specific disclosure requirements under the Takeovers Code or Share Buy-backs Code. If in doubt, parties or their advisers should consult us at the earliest opportunity.

Any subsequent announcements or documents, including composite documents and whitewash circulars to be sent to shareholders, must also be provided to us for comment before despatch in compliance with Rule 12.1. At all times we should be provided with advanced drafts of the announcement or document and be given reasonable time to review them.

Further guidance on the submission of announcements and documents under the Codes can be found in the September 2014 *Takeovers Bulletin* (Issue No. 30) and Practice Note 20 (PN20) on the SFC website.

Failure to comply with the Codes may result in disciplinary action against the parties in breach. Issuers are strongly advised to seek professional advice in respect of relevant transactions. As always, if there is any doubt as to whether a proposed course of action complies with the Codes, the parties or their advisers should consult us at the earliest opportunity.

Revisions to Practice Note 20

PN 20 is a guidance note on announcements and documents under the Codes. We have received continuous positive feedback about PN 20 since its implementation in March 2014 and are pleased to note a high level of compliance. PN 20 has now been revised in light of feedback received and in order to address a number of issues which have arisen. Highlights of the amendments to PN 20 include:

New paragraphs 2 and 4 – Definition of “document”

As mentioned above, a number of issuers and advisers have failed to submit Code documents to us for pre-vetting before publication. We have therefore added new paragraphs 2 and 4 to remind issuers about their obligation to file draft documents for our comment in advance of publication as required by Rule 12.1 of the Takeovers Code, unless the announcement falls within the Post-Vet List.

PN 20 now contains a reminder that at the outset of a transaction, issuers and advisers should carefully consider whether an announcement is a “document” for the purpose of the Codes and if so, comply with Rule 12.1 and other requirements, including the specific disclosure requirements under the Takeovers Code or Share Buy-backs Code. We should be given reasonable time to review a document when it is submitted for comment. The document submitted should be in an advanced form, and points of difficulty and any unusual aspects should be drawn to our attention at an early stage.

New paragraphs 14 and 15 – Previous six months dealings

New paragraph 14 reminds an offeror to check carefully against its trading records to confirm whether it has dealt in any relevant securities of the offeree company (and of the offeror in the case of a securities exchange offer) in the six months prior to (i) the date of submission of the first draft of the Rule 3.5 announcement; or (ii) the commencement of the offer period, whichever is earlier. The offeror should also make similar enquiries with its concert parties for this purpose. A similar reminder to whitewash applicants is set out in new paragraph 15.

These reminders should assist parties to ensure that relevant requirements of the Codes are met including those that arise under Rules 23, 24 and 26.3 in relation to offers and the disqualifying transaction provisions that apply to whitewash waivers set out in paragraph 3 of Schedule VI.

New paragraphs 18 to 20 – Offer period

We have added new paragraphs 18 to 20 to clarify that an offer period commences when an announcement of a proposed offer or possible offer is made, ie, possible offer announcements made under Rule 3.7 or firm intention to make an offer announcements made under Rule 3.5 of the Takeovers Code. This differs from the “commencement of an offer” which signifies the first day the offer is made and open for acceptance upon the despatch of the offer document or composite document. Once an offer period commences, relevant parties are subject to a number of Code disciplines including dealing disclosure obligations and restrictions imposed on offeree company directors from engaging in frustrating action. This list is not exhaustive and we should be consulted in cases of doubt.

Paragraph 23 (original paragraph 14) – List of class (6) associates and other details

Following the commencement of an offer period, the potential offeror, the offeror and the offeree company should provide us with a list of their class (6) associates, details of their financial or professional advisers, and details of any financial adviser or

stockbroker that is currently retained in relation to any advisory projects which are significant in size or nature. We have clarified at the end of paragraph 23 that where there has been any change or update to the information previously submitted, we should be notified immediately.

Paragraph 28 (original paragraph 21) – Schedule disclosure requirements

Paragraph 28(iii) provides that checklists of compliance with Schedules I, II, III and VI of the Codes as appropriate should be provided to us immediately after the document is posted. We have clarified that during the completion of the Schedule's checklist, if any requirement is not applicable because no such matter or arrangement exists, an appropriate negative statement should be clearly marked against the relevant schedule requirement.

A marked up version and a clean version of revised PN 20 can be found in the "Regulatory functions – Listings & takeovers – Takeovers & Mergers – Practice notes" section of the SFC website.

Quarterly update on the activities of the Takeovers Team

In the three months ended 31 March 2015, we received 19 takeovers-related cases (including privatisations, voluntary and mandatory general offers, and off-market and general-offer share buy-backs), 8 whitewashes and 77 ruling applications.

Useful links

- The Codes on Takeovers and Mergers and Share Buy-backs
- Practice notes
- Decisions and statements
- Previous *Takeovers Bulletins*

All issues of the *Takeovers Bulletin* are available under 'Published resources – Industry-related publications – *Takeovers Bulletin*' on the SFC website at www.sfc.hk.

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

If you want to receive the *Takeovers Bulletin* by email, simply subscribe at www.sfc.hk and select *Takeovers Bulletin*.

Corporate Regulation Newsletter and *Risk-focused Industry Meeting Series* are also available on the SFC website.

Securities and Futures Commission
35/F, Cheung Kong Center, 2 Queen's Road Central, Hong Kong

Phone : (852) 2231 1222
Fax : (852) 2521 7836

Website : www.sfc.hk
Email : enquiry@sfc.hk