

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

## Public consultation on issues relating to property valuation requirements, confirmation of independence and timing for payment of offer consideration

The SFC issued a public consultation paper on 24 August 2011 regarding proposed Code amendments on issues relating to property valuation requirements, confirmation of independence and timing for payment of offer consideration. The consultation period ended on 26 September 2011 and a conclusions paper will be issued in due course.

The paper contains three parts.

### Part 1 – Proposal to amend property valuation requirements

The Takeovers Code currently requires a valuation of properties in offers relating to companies with "significant property interests" (see Rule 11.1(f)). This normally refers to a company or group of companies whose property assets or consolidated property assets exceed 15% of the book value of total assets or total group assets.

In recent years, some market practitioners have suggested that the obligations in Rule 11.1(f) are unduly burdensome or inappropriate. Given this and in light of the views of the Takeovers Panel, the Executive proposes to amend the Codes so that a valuation of significant property interests would be required only in related party transactions or offers which involve special deals that require shareholder approval. In this context, a related party would refer to: (a) a controlling shareholder of a company (i.e. a person holding, together with its concert parties, 30% or more of the voting rights of the offeree company); (b) a director of the offeree company; or (c) a party acting or presumed to be acting in concert with anyone falling within category (a) or (b).

## Highlights

- Public consultation on proposed Code amendments
- Timing of disclosure of dealings in the time zones of the United States
- Update on overseas companies with secondary listings in Hong Kong to which the Codes do not apply
- Quarterly update on the activities of the Takeovers Team for the period ended 30 June 2011

The Executive believes that the more stringent requirements in Rule 11.1(f) should continue to apply to related party transactions and special deals where greater safeguards are considered appropriate. The proposed amendments recognise that in some circumstances the continued full application of Rule 11.1(f) may be unduly burdensome for the relevant company both in terms of the cost and time involved in obtaining an independent valuation, especially in cases when the need for the valuation arises from the action of an unrelated party.

## **Part 2 – Proposal relating to confirmations of independence in placing and top-up transactions**

The Takeovers Code provides that a waiver from a mandatory offer obligation will normally be granted where a shareholder holding 50% or less of the voting rights of a company places part of his holding with one or more independent persons and, as soon as practicable, subscribes for new shares up to the number of shares placed at a price substantially equivalent to the placing price after taking account of expenses incurred in the transaction (see Note 6 on dispensations from Rule 26).

The Takeovers Code provides that in processing an application for a waiver the Executive will normally require the financial adviser or placing agent to verify and/or confirm that the purchaser is independent so that the Executive may “*satisfy itself of the acquirer’s independence*” (see Note 7 on dispensations from Rule 26). At times, the current wording of Note 7 causes practical difficulties since enquiries concerning the independence of placees may be lengthy and time-consuming. These difficulties are magnified by the fact that the Executive is normally requested to confirm the independence of placees within a short timeframe (typically within 14 days to enable the company to comply with the relevant Listing Rules).

The Executive proposes to amend Note 7 to clarify that it is the responsibility of the financial advisers, placing agents and acquirers of the voting rights to confirm the independence of placees, and not the Executive. The Executive also proposes to amend Note 7 to clarify that the Executive may make enquiries about the independence of the acquirer of the voting rights after the completion of the placing and top-up transaction. In the event that the acquirer of the voting rights is found to have acted in concert with the vendor of the voting rights, any waiver which has been granted would be invalidated and the Executive would take appropriate action, including possibly requiring a general offer to be made in accordance with the requirements of Rule 26.

## **Part 3 – Timing for payment of acceptances**

The Takeovers Code provides that once an offer has become unconditional, the offeror must pay for any acceptances of the offer as soon as possible and in any event within 10 days (Rule 20.1). Under current practice, the 10-day payment period is calculated by reference to calendar days.

The Federation of Share Registrars Limited has raised a concern that when any part of the 10-day payment period coincides with Hong Kong Public Holidays (in particular Chinese New Year, Easter and Christmas) the available processing time for payment cheques to be despatched is significantly shortened, which causes practical difficulties. Given this the Executive proposes to change the prescribed time period from “10 days” to “7 business days”. “*Business day*” is defined in the Codes as “... a day on which the Stock Exchange is open for the transaction of business.”

Specifying the payment period by reference to business days should afford share registrars and receiving agents a more manageable timeframe to process payments without compromising the interests of accepting shareholders.

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## **Timing of disclosure of dealings in the time zones of the United States**

Dealings in relevant securities (see Note 4 to Rule 22) by parties to an offer (including the offeror and the offeree company) and their respective associates (see the definition of “associate” under the Codes) during an offer period are required to be disclosed in accordance with the provisions of Rule 22 of the Takeovers Code.

Note 5 to Rule 22 provides that “[d]isclosure must be made no later than 10.00 a.m. on the business day following the date of the transaction. Where dealings have taken place on stock exchanges in the time zones of the United States and there may be difficulty in disclosing dealings by 10.00 a.m., the Executive should be consulted.”

In practice, the Executive has allowed an additional business day for disclosure of dealings in US time zones. That is to say disclosure of dealings in US time zones is expected to be made no later than 10:00am on the second business day (Hong Kong time) following the date of the transaction. For example, if a dealing took place in New York on Monday (US time) the disclosure should be made no later than 10:00am on Wednesday (Hong Kong time).

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## Update on overseas companies with secondary listings in Hong Kong to which the Codes do not apply

In the September 2010 issue of the Takeovers Bulletin, the Executive explained in the article entitled “The Codes do not apply to all listed companies in Hong Kong” why an overseas company with a secondary listing in Hong Kong may not be considered a public company in Hong Kong and therefore the Codes did not apply to it. In practice, the Executive has received a number of applications for confirmation from overseas companies seeking secondary listings in Hong Kong that the Codes do not apply to them. Having carefully considered the factors set out in section 4.2 of the Introduction to the Codes including the “centre of gravity” test as set out in the September article, the Executive has confirmed, in a number of cases, that the overseas companies concerned should not be considered public companies in Hong Kong for the purpose of the Codes and hence the Codes do not apply to them after their secondary listings in Hong Kong.

With the recent increase of overseas companies with secondary listings in Hong Kong, the Executive believes that it would be useful to the market if an update of the names of overseas companies with secondary listings in Hong Kong to which the Codes do not apply is provided in the Takeovers Bulletin. A list of such companies up to the date of publication of this Takeovers Bulletin is set out below.

<b>Name</b>	<b>Stock Code</b>
Glencore International plc	805
Kazakhmys PLC	847
Manulife Financial Corporation	945
Midas Holdings Ltd	1021
SBI Holdings, Inc	6488
SouthGobi Resources Ltd	1878
Vale S.A.	6210/6230

A list (updated from time to time) of the names of overseas companies with secondary listings in Hong Kong, to which the Codes do not apply, will be available on the SFC website in due course.

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## Quarterly update on the Takeovers Team's activities in administration of the Codes

In the three months ended 30 June 2011, the Executive dealt with nine takeovers-related cases (including privatisations, voluntary and mandatory general offers and off-market and general-offer repurchases) and 12 whitewashes. The Executive also received 63 ruling applications.

The Executive referred two cases to the Takeovers Panel for a ruling during the quarter as particularly novel, important and difficult points were at issue. The Takeovers Panel also met once during the quarter to discuss policy-related issues.

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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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