

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

Takeovers Panel finds Chow Yei Ching, Joseph Leung Wing Kong and Oscar Chow Vee Tsung in breach of Takeovers Code

On 13 March 2015, the Takeovers and Mergers Panel (Takeovers Panel) found that Mr Chow Yei Ching (Chow), Mr Joseph Leung Wing Kong and Mr Oscar Chow Vee Tsung breached the mandatory offer requirement under the Code on Takeovers and Mergers (Takeovers Code) when they acted in concert with the late Ms Nina Kung to obtain and consolidate control over ENM Holdings Ltd (ENM) through the acquisition of voting rights. They also failed to make a general offer as required by the Takeovers Code.

On 20 November 2013, we commenced disciplinary proceedings against Chow and the others before the Takeovers Panel where we alleged that they actively cooperated to assist Kung to obtain or consolidate control of ENM and to avoid the triggering of a mandatory general offer under the Takeovers Code. Chow is the chairman of Chevalier Group, Oscar Chow (Chow's son) is a director of Chevalier International Holdings Limited and Joseph Leung is the chairman of ENM.

The Takeovers Panel will issue its written reasons in due course.

Highlights

- Takeovers Panel finds breach of mandatory offer requirement
- Revisions to Practice Note 2 in relation to profit forecasts
- Appointments and reappointments to the Takeovers and Mergers Panel and Takeovers Appeal Committee
- Quarterly update on the activities of the Takeovers Team

Revisions to Practice Note 2 in relation to profit forecasts requirement

Practice Note 2 (PN2) deals with the treatment of certain financial projections which may appear in Code-related documents. These financial projections are normally regarded as profit forecasts under Rule 10 of the Takeovers Code and are therefore required to be “reported on” (under Rule 10.4) by the related companies’ financial advisers and accountants or auditors before the publication of the announcement containing the forecast. PN2 also states that the Executive will normally be prepared to relax the strict application of Rule 10 and permit publication of a forecast without it being reported on prior to its initial publication if (i) the disclosure is required in compliance with the laws and regulations of an overseas jurisdiction; or (ii) the disclosure is made in compliance with the inside information provisions in Part XIVA of the Securities and Futures Ordinance. Please see PN2 for further details.

In recent years we have encountered a number of Code-related transactions which were also classified as notifiable transactions under the Listing Rules of The Stock Exchange of Hong Kong Limited (Listing Rules). In these cases, a conflict has arisen between the requirements of Rule 10 of the Takeovers Code and Listing Rule 14.58.

Listing Rule 14.58 requires the disclosure of the net asset value of, and net profits or losses attributable to, the assets acquired or disposed of for the two financial years immediately preceding the transaction (Required Financial Information) in the announcement that contains details of the transaction. Rule 14.58 does not require the Required Financial Information to be audited. In a Code-related transaction, the Required Financial Information, if unaudited and disclosed in an announcement, would constitute a profit forecast under Rule 10 and would therefore need to be ‘reported on’ in accordance with Rule 10.4.

In the above circumstances, in order to facilitate timely disclosure of the Required Financial Information, where the parties issuing the forecast have encountered genuine practical difficulties (time-wise or otherwise) in meeting the reporting requirements under Rule 10.4, the Executive should be consulted at the earliest opportunity. In these cases, we will normally consent to the publication of the Required Financial Information without full compliance with Rule 10, provided that: (i) the relevant announcement contains an appropriate warning that the Required Financial Information does not meet the standard required by Rule 10 and that shareholders and potential investors should exercise caution in placing reliance on the Required Financial Information in assessing the merits and demerits of the Code-related transaction; and (ii) the Required Financial Information will be reported on as soon as practicable thereafter and the relevant reports set out in the next document to be sent to shareholders. This may require the issuance of a supplemental document to shareholders if an offer document, response document or whitewash circular has been issued. It follows that a waiver from the Stock Exchange from Listing Rule 14.58 should normally no longer be required.

Issuers and their advisers are reminded to check from the outset whether Rule 10 applies to any financial information to be published so that the reporting requirements in Rule 10 can be met with a minimum of delay. In determining what constitutes “practical difficulties”, we will take into account the specific facts and circumstances of each case. We should be consulted at the earliest opportunity.

Consequential changes to PN2 can be found in the “Regulatory functions – Listings & takeovers - Takeovers & Mergers – Practice notes” section of the SFC website.

Appointments and reappointments of members to the Takeovers and Mergers Panel and Takeovers Appeal Committee

We welcome the following new appointments and reappointments to the Takeovers and Mergers Panel (Panel) and the Takeovers Appeal Committee (Appeal Committee) with effect from 1 April 2015:

New appointments – Mr Fu Yat Hung, David and Ms Park Yoo Kyung

Reappointments – Mr Stephen Clark (Chairman of the Panel and Appeal Committee), Mr Freeman Chan and Mr David Webb (Deputy Chairmen of the Panel and members of the Appeal Committee), Ms Melissa Brown, Mr Roger Denny, Mr Ernest Ip, Mr Edward Lam, Mr Bonn Liu, Ms Teresa Ma and Mrs Judy Vas.

Full list of members of takeovers-related committees

Members are appointed for a term of two years until 31 March 2017 unless otherwise stated. The membership lists for the Panel, the Appeal Committee, the Disciplinary Chair Committee and the Nominations Committee are set out below.

Panel

The Panel hears disciplinary matters in the first instance, reviews rulings by the Executive at the request of any party dissatisfied with such a ruling and considers novel, important or difficult cases referred to it by the Executive. It also 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 Chan Yuk Sing, Freeman

Ms Ko, Teresa Yuk Yin, JP*

Mr Liu Chee Ming*

Mr Maguire John Martin*

Mr Webb David Michael

Members

Ms Brown Melissa

Mr Chan Che Chung*

Ms Charlton Julia Frances*

Mr Denny Roger Michael

Mr Fu Yat Hung, David

Mr Ip Koon Wing, Ernest

Mr Kwok Tun Ho, Chester*

Mr Lam Sung Lai, Edward

Mrs Lee Pui Ling, Angelina, SBS, JP*

Mr Liu Che Ning*

Mr Liu Yun Bonn

Mr Lung Hak Kau*

Ms Ma, Ka Ming Teresa

Mr Norman David Michael*

Mr Norris Nicholas Andrew*

Ms Park Yoo Kyung

Mr Perry Jonathan Garth*

Mr Sabine Martin Nevil*

Mr Schwillie Mark Andrew*

Mr Soutar James Alexander*

Mrs Vas Chau Lai Kun Judy

Mr Winter Richard David*

Ms Yu Ka Po, Benita*

* Reappointed/appointed on 1 April 2014 for a term of two years until 31 March 2016.

Appeal Committee

The 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. It 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.

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.

Members

Mr Chan King Sang, Edward, SC*
Mr Jat Sew Tong, SC, JP*
Ms Li Gladys Veronica, SC*
Mr Shieh Wing Tai, Paul, SC*
Mr Wong Yuk Lun, Horace, SC*

* Reappointed/appointed on 1 April 2014 for a term of two years until 31 March 2016.

Nominations Committee

The Nominations Committee nominates members of the Panel, the Appeal Committee and Disciplinary Chair Committee.

Ex officio Members

Mr Alder Ashley Ian, JP (Chairman)
Mr Clark Stephen Edward
Mr Ho Yin Tung, Brian

Members

Mr Tong Carlson, SBS, JP*
Dr William Wong Ming-fung, SC[#]

Alternate members to Mr Clark Stephen Edward

Mr Chan Yuk Sing, Freeman
Ms Ko, Teresa Yuk Yin, JP
Mr Liu Chee Ming
Mr Maguire John Martin
Mr Webb David Michael

* Reappointed on 1 April 2014 for a term of two years until 31 March 2016.

[#] Appointed on 12 September 2014 for a term of two years until 11 September 2016.

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

Quarterly update on the activities of the Takeovers Team

In the three months ended 31 December 2014, we received 14 takeovers-related cases (including privatisations, voluntary and mandatory general offers and off-market and general-offer share buy-backs), nine whitewashes and 64 ruling applications.

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

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