

Application of Note 3 to Rule 22 to associates when an offer is unconditional at the outset

During an offer period, Rule 22 of the Takeovers Code requires parties to an offer and their respective associates (as defined in the Codes) to disclose their dealings in relevant securities (as defined in Note 4 to Rule 22) of the offeree company (and the offeror in securities exchange offers) conducted for themselves or on behalf of discretionary clients. Associates include any person who owns or controls 5% or more of any class of such relevant securities.

Note 3 to Rule 22 of the Takeovers Code provides that *"[t]his Rule 22 applies only during an offer period. Dealings by associates (other than persons acting in concert with any offeror) need not be disclosed during the period between the date when the offer becomes or is declared unconditional in all respects and the end of the offer period."*

We have been consulted on a number of occasions about the application of Note 3 to offers that are unconditional in all respects at the outset. We have confirmed in these cases that so long as they are not concert parties of an offeror, associates are only required to disclose dealings that take place from the date of commencement of the offer period to the date of despatch of the offer document or composite document. The reason for this is once an offer is unconditional in all respects, dealings by parties not closely connected to the offeror are unlikely to be relevant information for minority shareholders to assess the merits of an offer, and accordingly disclosures are not necessary.

Highlights

- Dealing disclosures by associates during an offer period
- Reminder about definition of "Document" and Rule 12.1
- Confirmation of shareholdings in placing and top-up transactions
- Communication with the Executive by fax or email
- Quarterly update on the activities of the Takeovers Team

Reminder to submit Code documents to the Executive for comment prior to release or publication

Rule 12.1 of the Takeovers Code requires all Code-related announcements and documents (other than announcements appearing in the Post-Vet List) 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.”*

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

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

In a number of recent cases parties and their advisers have overlooked the definition of “document”. As a result, issuers have failed to submit draft announcements to the Executive for comment prior to their release and to comply with the necessary disclosure requirements such as inclusion of the requisite directors’ responsibility statement under Rule 9.3 of the Takeovers Code. Transactions which are conditional on no general offer arising under the Takeovers Code are of particular concern. Clarification announcements have been issued where appropriate.

At the onset of a transaction, issuers and their advisers should carefully consider whether an announcement is a document for the purpose of the Takeovers Code and comply with Rule 12.1 as appropriate. Where a transaction is stated to be conditional on the Executive/SFC not having indicated that the transaction will trigger a mandatory general offer obligation under the Takeovers Code, the announcement will fall under paragraph (2) of the definition of “document” and should be filed with the Executive for comment prior to publication.

Confirmation of past shareholdings in placing and top-up transactions

In the December 2010 issue of the Takeovers Bulletin the Executive clarified its approach to confirmations of past shareholdings in placing and top-up transactions.

Note 6 on dispensations from Rule 26 provides that a waiver will normally be granted where a shareholder, who together with persons acting in concert with him holds 50% or less of the voting rights of a company, places part of his holding with one or more independent persons and then, as soon as is 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. Note 6 further provides that where a placing shareholder, together with persons acting in concert with him, has continuously held more than 50% of the voting rights of the company for at least 12 months immediately preceding the relevant placing and top-up transaction, a waiver would not be required. This is the case even if the placing shareholder’s interest drops below 50% during the placing and creeps more than 2% following the top-up subscription.

In order to clarify that the transaction will not require a waiver under Note 6, we strongly recommend that an issuer includes a confirmation in the relevant announcement that the placing shareholder and his concert parties have continuously held more than 50% of the voting rights of the company in the 12 months immediately before the placing and top-up transaction. In the absence of such disclosure, we should be provided with a separate written confirmation to such effect immediately following the publication of the relevant announcement.

Parties who issue Code-related announcements and documents are reminded that they are ultimately responsible for the information disclosed as well as for compliance with the Codes and any other applicable laws and regulations.

Communication with the Executive by fax or email

We will make every effort to attend to communications sent to us by fax or email as soon as we can. However, for urgent matters that require our immediate attention (particularly at lunch time), please call the relevant case officers or alternatively the general Takeovers Hotline on 2231 1210 to speak to one of us directly.

Quarterly update on the activities of the Takeovers Team

In the three months ended 30 June 2014, we received 10 takeovers-related cases (including privatisations, voluntary and mandatory general offers and off-market and general-offer share buy-backs), seven whitewashes and 57 ruling applications.

We also referred one case to the Takeovers Panel for a ruling as particularly novel, important and difficult points were at issue.

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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