

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

## Practice Note 1 - Partial offers

Practice Note 1 (PN1) clarifies a number of issues concerning partial offers. It states that a partial offer can be made by way of the "share register method" or "common pool method". In light of a number of cases, the Executive has recently reviewed these methods and has amended PN1 to make it clear that a partial offer by way of the "share register method" may only be adopted if the record date is not altered.

As explained in PN1, if the share register method is adopted, the offer is made for a specific proportion of each shareholder's shares that are registered in his name on the record date. In this instance an accepting shareholder is assured that a minimum number of the shares held by him on the record date will be accepted by the offeror if the offer becomes unconditional. In such cases, a record date to ascertain assured acceptances, and where relevant entitlements to vote (see Rule 28.5), must be announced along with the terms of the partial offer in the announcement of a firm intention to make the partial offer (issued under Rule 3.5 of the Takeovers Code).

The common pool method is where the number of shares taken up by the offeror from each shareholder is determined by the total number of shares tendered for acceptance.

If the share register method is adopted, typically the record date is set at 4:00 pm on the same date as the "first closing date" of an offer which must be at least 21 days (and normally not more than 60 days) from the date on which the offer document is posted to shareholders (Rule 15 of the Takeovers Code). It follows that only those shares voted and/or tendered by shareholders whose names appear on the share register at 4:00 pm on the record date would be counted for acceptances and fulfilment of the voting requirement under Rule 28.5. The offeror may not move the record date from the first closing day to a later date in the hope that it would improve voting results and/or acceptance levels. The reason for this is that the change of record date would give rise to various double counting issues in respect of both acceptance and where relevant voting levels which would lead to unacceptable uncertainty and confusion.

In the case of the common pool method, if the relevant acceptance and voting thresholds have not been met by the

## Highlights

- Practice Note 1 revised to clarify limitations of using the share register method to make partial offers
- Practice Note 15 revised to clarify certain issues relating to confirmations of sufficient financial resources
- Takeovers Panel rules no general offer obligation triggered for Hung Hing Printing Group Ltd
- Takeovers Panel rules Husky Energy Inc not a public company in Hong Kong
- Update on the activities of the Takeovers Team in the six months ended 31 March 2011

first closing date, the offeror may opt to extend the first closing date which normally should not be later than 7:00 pm on the 60th day after the day the initial offer document was posted (see Rule 15.5).

In both the share register method and common pool method, if on a closing day, the acceptances received exceed the precise number of shares stated in the offer document (see Rule 28.7), and where relevant the voting thresholds (set out in Rule 28.5) are met, the offeror must declare the partial offer unconditional in all respects and extend the offer for a final 14 days thereafter (see Rule 15.3). In both cases, the offeror cannot further extend the final closing day (see Rule 28.4).

PN 1 has been revised to reflect the above and can be found on the Practice Note page of the Takeovers and Mergers section of the SFC website.

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## Revised Practice Note 15 – Confirmation of financial resources in cash offers

Practice Note 15 (PN 15) has been revised to clarify certain issues relating to confirmations of sufficient financial resources.

Rule 3.5 of the Takeovers Code provides that "*[t]he announcement of an offer should include confirmation by the financial adviser or by another appropriate third party that resources are available to the offeror sufficient to satisfy full acceptance of the offer.*"

Note 3 to Rule 3.5 of the Takeovers Code provides that "*[t]he Executive may also require evidence that the offeror has sufficient resources to complete the purchase of shares which gives rise to the offer obligation.*"

The Executive would like to clarify that in cases where an acquisition of shares would give rise to a mandatory offer obligation, the Executive expects the confirmation in relation to sufficient financial resources also to cover the necessary resources required to complete the acquisition of shares.

The Executive would like to further clarify that the making of offers, whether voluntary or mandatory, must not be subject to financing conditions.

When an offeror announces a firm intention to make a cash offer under Rule 3.5 of the Takeovers Code, it is required to have in place the necessary financing arrangements to satisfy full acceptance of the offer. It would not be acceptable for such an offer to be subject to a condition that the offeror is able to obtain relevant financing to proceed with the offer or any other condition to similar effect.

Similarly, in cases where an acquisition of shares would give rise to a mandatory offer obligation, it will not be acceptable for the sale and purchase agreement in respect of the acquisition to contain a condition that the offeror is able to obtain relevant financing to make the mandatory offer following completion of the acquisition or any other condition to similar effect.

In cases of doubt the Executive should be consulted at the earliest opportunity.

In addition, PN 15 has been revised to clarify that the Executive continues to apply the safeguards recommended by the Panel in 2008.

The revised PN 15 can be found on the Practice Note page of the Takeovers and Mergers section of the SFC website.

## Takeovers Panel rules no general offer obligation triggered for Hung Hing Printing Group Ltd

On 12 April 2011, the Takeovers and Mergers Panel ruled that there was insufficient evidence to establish that Rengo Co, Ltd was acting in concert with the family of the late Mr Yam Cheong Hung in relation to an acquisition of 29.9% of the voting rights in Hung Hing from Asia Packaging Co, Ltd. Accordingly, the acquisition would not trigger a general offer obligation under Rule 26.1 of the Takeovers Code.

The Panel also ruled that there was no evidence to suggest that Rengo had any control or influence over the residual stake to be held by Asia Packaging following the acquisition.

The matter was referred to the Panel by the Executive under section 10.1 of the Introduction to the Codes as particularly novel, important or difficult points were at issue. The decision was published on 24 May 2011.

The full written decision of the Panel can be found in the "Prospectuses, Takeovers & Mergers" – "Takeovers and Mergers" – "Panel and Executive Decisions/Statements" section of the SFC website.

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## Takeovers Panel rules Husky Energy Inc not a public company in Hong Kong

On 13 April 2011, the Takeovers and Mergers Panel ruled that Husky Energy Inc should not, at the time of its possible secondary listing on The Stock Exchange of Hong Kong Ltd, be treated as a public company in Hong Kong under section 4.1 of the Introduction to the Codes.

As a result of the Panel's ruling, the Codes will not apply to Husky Energy Inc in the event that the secondary listing takes place.

The matter was referred to the Panel by the Executive under section 10.1 of the Introduction to the Codes as particularly novel, important or difficult points were at issue. The decision was published on 30 June 2011.

The full written decision of the Panel can be found in the "Prospectuses, Takeovers & Mergers" – "Takeovers and Mergers" – "Panel and Executive Decisions/Statements" section of the SFC website.

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

Further to our update on the activities of the Takeovers Team in the December 2010 issue of the Takeovers Bulletin, in the six months ended 31 March 2011, the Executive dealt with 15 takeovers-related cases (including privatisations, voluntary and mandatory general offers and off-market and general-offer repurchases) and 15 whitewashes. The Executive also received 118 ruling applications.

The Executive referred one case to the Takeovers Panel for a ruling during this six-month period as particularly novel, important and difficult points were at issue.

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