

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

Consultation conclusions on takeovers-related amendments

We issued a consultation paper on 24 August 2011 regarding proposed Code amendments on issues relating to property valuation requirements, confirmation of independence in placing and top-up transactions and timing for payment of offer consideration.

We received 18 written submissions during the consultation period, which ended on 26 September 2011.

On 23 March 2012 we issued a conclusions paper containing our response to public comments received. The following amendments became effective on the same day:

- Property valuation requirements in Rule 11.1(f) now only apply to offers when the offeror is an interested party. An interested party refers to "...*(i) a party holding, or together with parties acting in concert with it holding, immediately before either the commencement of an offer period or an obligation arises to make a mandatory offer under Rule 26.1, 30% or more of the voting rights of the offeree company; (ii) a director of the offeree company; or (iii) a party acting in concert with any of (i) or (ii)*".
- Note 7 on dispensations from Rule 26 of the Takeovers Code has been amended to clarify that it is the responsibility of the financial adviser, placing agent and acquirer of the voting rights to confirm the independence of placees. The revised note also clarifies that the Executive may make enquiries about the independence of the acquirer of the voting rights before granting a waiver as well as 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 such voting rights, any waiver which has been granted will normally be invalidated and the Executive will take appropriate action including possibly requiring a general offer to be made in accordance with the requirements of Rule 26.

Highlights

- Consultation conclusions on takeovers-related amendments
- Limitation of consultations on a no-name basis
- Re-appointment of members to the Takeovers and Mergers Panel and related committees
- Penta Investment Advisers Limited publicly criticised for dealing disclosure breaches
- Quarterly update on the activities of the Takeovers Team for the period ended 31 December 2011

- Rule 20.1 now requires an offeror to pay for any acceptances of an offer as soon as possible and in any event within seven business days.

The consultation and conclusions papers can be found in the section “Prospectuses, Takeovers & Mergers” – “Takeovers and Mergers” – “Consultation Papers & Conclusions” of the SFC website.

Limitation of consultations on a no-name basis

Section 6.1 of the Introduction to the Codes provides that when there is any doubt as to whether a proposed course of conduct is in accordance with the General Principles or the Rules, parties or their advisers should always consult the Executive in advance. In this way, the parties can clarify the basis on which they can properly proceed and thus minimise the risk of taking action which might be a breach of the Codes. Market practitioners are reminded that views expressed by the Executive under consultations are preliminary and do not bind the Executive. This is clearly stated in section 6.2 of the Introduction to the Codes.

From time to time the Executive is consulted by market practitioners on the applicability of certain Code requirements in relation to a proposed transaction on a no-name basis (i.e. the identities of the parties involved are not disclosed to the Executive). While in principle, the Executive is prepared to entertain consultations made on a no-name basis, the Executive should not be expected to answer purely hypothetical questions. However, the Executive should not be asked to express a view on a no-name basis if the question relates to an on-going matter being handled by the Executive in which the identities of relevant parties have already been disclosed.

Furthermore, the Executive’s response in a consultation conducted on a no-name basis may be affected greatly as the identities of the parties may have a bearing on the applicability of relevant Code requirements. Important factors such as the relationship between the parties and previous transactions conducted by them may be relevant in determining the application of certain Code requirements. It follows that less reliance may be placed on views expressed in a consultation conducted on a no-name basis as the Executive would not be able to express its views on a fully-informed basis.

In view of the above, the Executive encourages market practitioners to disclose the identities of the parties involved and any other material facts when consulting the Executive unless there are exceptional circumstances deterring such disclosure to the Executive. For the avoidance of doubt, the contents of consultations are kept confidential by the Executive in the same way as all other takeover-related matters dealt with by the Executive.

Re-appointment of members to the Takeovers and Mergers Panel and related committees

We welcome the re-appointment of members to the Takeovers and Mergers Panel (Panel), the Takeovers Appeal Committee (Appeal Committee), the Disciplinary Chair Committee and the Nominations Committee with effect from 1 April 2012.

We also welcome the appointment of Mr Cheung Yuk Tong, Mr David Norman and Mr Mark Schwille as new members of the Panel and Appeal Committee.

We wish to thank Mr David Graham and Mr V-Nee Yeh who have stepped down from the Panel and the Appeal Committee for their valuable contributions over the years.

Members are appointed for a term of two years and unless otherwise stated, their current terms are until 31 March 2014. The full membership lists are given 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

Ms Ko, Teresa Yuk Yin, JP

Mr Liu Chee Ming

Mr Maguire John Martin

Members

Mr Chan Yuk Sing, Freeman

Ms Charlton Julia Frances

Mr Cheung Yuk Tong

Mr Denny Roger Michael*

Ms Desai Kalpana

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 Swee Long, Michael

Mr Liu Yun Bonn*

Mr Lo Kin Ching, Joseph*

Mr Lung Hak Kau, Karl

Ms Ma, Ka Ming Teresa*

Mr Nesbitt Gavin Paul

Mr Norman David Michael

Mr Norris Nicholas Andrew

Mr Rodgers Daniel James*

Mr Sabine Martin Nevil

Mr Schwille Mark Andrew

Mr Swift, Christopher Lee*

Ms Tan Siew Boi, May

Mr Tortoisshell Andrew*

Mrs Vas Chau Lai Kun Judy*

Mr Webb David Michael

Mr Winter Richard David

Ms Yu Ka Po, Benita

* reappointed/appointed on 1 April 2011 for a term of two years until 31 March 2013

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 counsels. 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 Kin Keung, Anthony, SC
Mr Chan King Sang, Edward, SC
Mr Ho Ambrose, SC
Ms Li Gladys Veronica, SC
Mr Ng Kar Fai, Peter, SC
Mr Wong Yuk Lun, Horace, SC

Nominations Committee

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

Ex officio Members

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

Members

Dr Fong Ching, Eddy, GBS, JP
Mr Chow Ka Ming, Anderson, SC*

Alternate members to CLARK Stephen Edward

Ms Ko, Teresa Yuk Yin, JP
Mr Liu Chee Ming
Mr Maguire John Martin

* appointed on 1 April 2011 for a term of two years until 31 March 2013

A full list of members of the Panel, the Appeal Committee, the Disciplinary Chair Committee and the Nominations Committee can be found in the section "Prospectuses, Takeovers & Mergers" – "Takeovers and Mergers" – "Takeovers Panel & Appeal Committee" of the SFC website at www.sfc.hk.

Penta Investment Advisers Limited publicly criticised for dealing disclosure breaches

On 13 March 2012, the Executive publicly criticised Penta Investment Advisers Limited for dealing disclosure breaches under Rule 22 of the Takeovers Code.

A copy of the Executive's Statement dated 13 March 2012 can be found in the section "Prospectuses, Takeovers & Mergers" – "Takeovers and Mergers" – "Panel and Executive Decisions / Statements" of the SFC website.

Reminder to associates of their dealing disclosure obligations

The Executive wishes to take this opportunity to remind practitioners and parties who wish to take advantage of the securities markets in Hong Kong that they should conduct themselves in matters relating to takeovers and mergers in accordance with the Takeovers Code. Associates with a 5% or more interest in the offeree company or offeror company must report their dealings in the offeree company (or offeror company as well in the case of a securities exchange offer) during an offer period in accordance with Rule 22 of the Takeovers Code.

Quarterly update on the Takeovers Team's activities

In the three months ended 31 December 2011, the Executive dealt with nine takeovers-related cases (including privatisations, voluntary and mandatory general offers and off-market and general-offer repurchases) and 10 whitewashes. The Executive also received 58 ruling applications.

The Takeovers Panel met once during this three-month period on policy-related issues.

The Takeovers Bulletin is available under 'Speeches, Publications & Consultations' – 'Publications' of the SFC website at <http://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 register for the Update Email Alert service at <http://www.sfc.hk> and select Takeovers and Mergers. Intermediaries licensed by the SFC receive the Takeovers Bulletin via their FinNet email accounts.

Securities and Futures Commission, 8/F Chater House,
8 Connaught Road Central, Hong Kong

Phone : (852) 2840 9222

Fax : (852) 2521 7836

SFC website : www.sfc.hk

Media : (852) 2283 6860

InvestEd website : www.InvestEd.hk

E-mail : enquiry@sfc.hk