



## SFC COMMENTS TO FOCUS ON SUBSTANTIVE TAKEOVERS CODE ISSUES FROM 1 JULY 2014

### Introduction

The Takeovers Bulletin published by the Securities and Futures Commission (**SFC**) in June 2014 sets out the Executive's new approach to commenting on documents which will focus on substantive Code issues rather than Schedule disclosure requirements. The new approach is being adopted with respect to all shareholder documents submitted for comment after 1 July 2014.

Rule 12.1 of the Takeovers Code requires all documents not on the Post-Vet List to be filed with the Executive for comment prior to release or publication and prohibits their release or publication before the Executive has confirmed that it has no further comments. The Rule aims to ensure that Code issues are identified before a document is published and to encourage early consultation with the Executive. The Takeovers Bulletin notes that issuers and their advisers have placed excessive reliance on the commenting process, which has resulted in extensive and repetitive comments by the Executive in some cases, making the commenting process lengthy and inefficient.

The new approach is intended to make issuers and their advisers aware that the responsibility for compliance with the disclosure requirements set out in Schedules I, II, III and VI of the Takeovers Code (the **Schedule disclosure requirements**) rests solely with the issuers of the documents and their advisers.

### Role of the Executive

Under the new approach, the Executive will:

- review a draft shareholder's document and raise comments regarding substantive Code issues, such as the requirements relating to profit forecasts and property valuations under Rules 10 and 11 of the Takeovers Code, and seek clarification of statements where appropriate;
- continue to comment on the letter of advice from independent financial advisers and be available for consultation regarding Code issues;
- no longer raise comments about compliance with the Schedule disclosure requirements during the commenting process unless they also relate to substantive Code issues.

### Documentation Requirements

As previously, draft documents should not be submitted to the Executive unless they are in an advanced form. It is expected that documents submitted should comply fully with the Schedule disclosure requirements and contain information which is up-to-date, true, accurate and complete. It is acknowledged that certain information may need to be updated at a later stage during the commenting process. Where this is the case, the draft document should highlight that certain information may need to be updated. The Executive has the right to return non-compliant documents to the sender. Should the issuer of a document (or its directors or advisers) foresee any difficulty

in meeting a Schedule disclosure requirement, the Executive must be consulted at the earliest opportunity and be given a reasonable time to consider the matter before the due date for despatch of the document.

The documents which are required to be submitted to the Executive for comment are those which are to be despatched to shareholders, i.e. offer documents, offeree board circulars, composite documents, whitewash circulars, share buy-back circulars or scheme documents. When a shareholder document is submitted to the Executive for comment, the documents set out at paragraph 19 of Practice Note 20 (**PN 20**) must be provided to the Executive. These include the following:

- i) four hard copies (including the acceptance forms, where applicable) and one electronic version (sent to T&Mdocuments@sfc.hk) of the draft document which is required to be in an advanced form and of each subsequent draft;
- ii) document fees and a statement of calculation in accordance with Schedule IV of the Takeovers Code;
- iii) a draft confirmation of no material change as required by Rule 10.11 of the Takeovers Code to be dated as at the Latest Practicable Date (i.e. the date not more than three days from the date of despatch of the relevant document, unless that day is not a “business day” as defined in the Codes, in which case it can be set on the preceding business day). This must address the points set out in the note to Rule 10.11; and
- iv) a draft update of the financial adviser’s confirmation to the offeror confirming that sufficient resources remain available to the offeror to satisfy full acceptance of the offer.



### Post-Publication Review and Follow-Up Action

Following the publication of any document, the documents listed in paragraph 6 of PN20 must be submitted to the Executive as soon as practicable. These documents are listed at Annex 1 to this newsletter.

In the case of shareholder documents which are required to be vetted by the Executive, the Executive must additionally be provided with two hard copies and one electronic version of the published version of the document (both English and Chinese versions) and a posting certificate for the document as required by Note 4 to Rule 8. These must be submitted to the Executive immediately following the posting of the document to shareholders.

PN20 was amended with effect from 1 July 2014 to require that when the issuer(s) of a document provide the Executive with copies of the published version of the shareholder’s document, they should also provide the Executive with completed checklists of compliance with the disclosure requirements of Schedules I, II, III, and VI of the Codes, as appropriate. The checklists must clearly mark the page number of the **published version** of the document against the relevant schedule requirement evidencing compliance. Every effort should be made to ensure that the document fully complies with the relevant Schedule disclosure requirements before the document is posted to shareholders. A checklist of items which must be submitted to the Executive is set out at Appendix 1 to PN20 which is reproduced at Annex 2 to this newsletter.

The amendments to PN20 mean that there is no need to provide the Executive with checklists of compliance with relevant Schedule disclosure requirements **prior** to the publication of a shareholder’s document, but rather immediately after a document is posted to shareholders. The new regime places the responsibility for compliance with the Schedule requirements entirely on the issuers of documents and their advisers, to the exclusion of the Executive.

The Executive will review shareholder documents for Schedule compliance **after** publication and, where necessary, will make appropriate enquiries. The Executive expects relevant parties and their advisers to respond promptly to any follow-up enquiries and to provide all necessary information. Once an issue has been raised, parties and/or their advisers should make every effort to resolve it and this may require a clarification announcement or a supplementary document to be published. The Executive may take further action in cases of non-compliance.

Notwithstanding the new approach as set out in PN20, the Exchange may, where it considers it necessary or appropriate, require a party and/or its advisers to submit checklists of Schedule disclosure compliance before publication of a shareholder's document.

Paragraph 14 of PN20 has also been revised to indicate that a negative statement to the Executive is required where the potential offeror, offeror or the offeree company has no class (6) associates, or where no financial or other professional adviser (including a stockbroker) is: (i) advising any of the potential offeror, the offeror or the offeree company or any of their group companies in respect of the offer; or (ii) retained by any such party in relation to any advisory projects (other than the offer) which are significant in size or nature.

## **Annex 1 – Documents to be submitted to the Executive after Publication of Any Document**

The documents which must be submitted to the Executive as soon as practicable after the publication of any document are:

- 1) a marked-up version of the announcement/document showing all changes (including deletions) made subsequent to the Executive's "no further comment" confirmation;
- 2) written confirmation by issuing party or its advisers that:
  - a) the announcement/document has been published and the time and date of publication; and
  - b) there has been no material change to the version of the announcement/document in respect of which the Executive has confirmed that it has no further comments;
- 3) written confirmation by the directors of the issuer of the announcement/document that the Chinese version of the announcement/document is a true and accurate translation of the English version (or vice versa). The provision of the confirmation does not absolve the responsibility of the directors of the issuing party in this regard.
  - a) The translation confirmation should be signed by a director (on behalf of the board of directors) of the issuer of the announcement/document. If the announcement/document is jointly issued, a confirmation should be provided by each of the parties issuing that announcement/document.

- b) The confirmation should be provided as soon as possible after the issue of the "no further comment" confirmation and in any event no later than 5:00 p.m. on the business day after publication. Confirmation in respect of an announcement which is on the Post-Vet List must be provided no later than 5:00 p.m. on the business day after publication.
- c) The confirmation should contain the following wording or wording of similar effect:

*"We [name of issuer], refer to the [description of the general offer/whitewash transaction/special deal/share buy-back/privatisation] and hereby confirm that the Chinese translation of the English version of the [description of the Document] issued by [name of issuer] on [date of Document] in relation to [description of the general offer/whitewash transaction/special deal/share buy-back/privatization] ("the Document") is a true and accurate translation of the English version of the Document, and that it is consistent with the English version of the Document. A copy of the published versions of each of the English and Chinese version of the Document dated [date] is enclosed for identification purposes.*

## Annex 2 – Compliance Checklist

	Items Required	Check/Date
<b>I</b>	<b>Rule 3.7 announcements</b>	
	<ul style="list-style-type: none"> <li>i. identity of potential offeror if not otherwise disclosed in the announcement, including its ultimate shareholders</li> <li>ii. publication confirmation</li> <li>iii. translation confirmation</li> <li>iv. list of class (6) associates and financial advisers of offeree company</li> <li>v. list of class (6) associates and financial advisers of potential offeror</li> </ul> <p>Note: Offeree company/potential offeror should send dealing disclosure reminders to their respective associates.</p>	
<b>II</b>	<b>Rule 3.5 announcements – offers/whitewash transactions</b>	
	<ul style="list-style-type: none"> <li>i. confirmation of sufficiency of financial resources by offeror’s financial advisers</li> <li>ii. IFA independence confirmation</li> <li>iii. publication confirmation</li> <li>iv. translation confirmation</li> <li>v. list of class (6) associates and financial advisers of offeror</li> </ul> <p>Note: Offeree company/potential offeror should send dealing disclosure reminders to their respective associates.</p>	
<b>III</b>	<b>Offer documents/response documents/composite documents/share buy-back documents/scheme documents-offer/share buy-backs</b>	
	<ul style="list-style-type: none"> <li>i. 4 copies of advanced draft</li> <li>ii. submission of soft copies of first draft (and each subsequent draft) to “T&amp;Mdocuments@sfc.hk”</li> <li>iii. document fee and schedule of calculation</li> <li>iv. signed reconfirmation of sufficiency of financial resources by offeror’s financial advisers</li> <li>v. signed Rule 10.11 confirmation by directors of offeree company/offeror</li> <li>vi. DoD disc and submission form</li> <li>vii. DoD confirmation</li> <li>viii. publication confirmation</li> <li>ix. checklist of Schedules I, II and III as appropriate</li> <li>x. posting certificate</li> <li>xi. translation confirmation</li> </ul>	
<b>IV</b>	<b>Circulars – whitewash transactions</b>	
	<ul style="list-style-type: none"> <li>i. 4 copies of advanced draft</li> <li>ii. submission of soft copies of first draft (and each subsequent draft) to “T&amp;Mdocuments@sfc.hk”</li> <li>iii. document fee and schedule of calculation</li> <li>iv. signed Rule 10.11 confirmation by directors of offeree company/offeror</li> <li>v. DoD disc and submission form</li> <li>vi. DoD confirmation</li> <li>vii. publication confirmation</li> <li>viii. checklist of Schedules I, II and IV</li> <li>ix. posting certificate</li> <li>x. translation confirmation</li> </ul>	

	Items Required	Check/Date
<b>V</b>	<b>Closing announcements – checklists of compliance with Schedules I, II, III, and VI of the Codes as appropriate. The checklists must clearly mark the page number of the published version of the document against the relevant schedule requirement evidencing compliance. Every effort should be made to ensure that the document fully complies with the relevant Schedule disclosure requirements before the document is posted to shareholders.</b>	
	<ul style="list-style-type: none"> <li>i. receiving agent’s certificate (if applicable)</li> <li>ii. publication confirmation</li> <li>iii. translation confirmation</li> <li>iv. confirmation of compliance with Rules 31.3 and 25 six months after closing date</li> </ul>	
<b>VI</b>	<b>Announcements of results of general meetings – whitewash transactions and court meetings – privatisation by way of scheme of arrangement</b>	
	<ul style="list-style-type: none"> <li>i. scrutineer’s certification</li> <li>ii. publication confirmation</li> <li>iii. translation confirmation</li> </ul>	
<b>VII</b>	<b>Announcement of final completion – whitewash transactions</b>	
	<ul style="list-style-type: none"> <li>i. confirmation of compliance with Rule 25 after six months after general meeting</li> <li>ii. final completion announcement publication confirmation</li> <li>iii. final completion announcement translation confirmation</li> </ul>	

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