



## SFC TAKEOVERS UPDATE: TAKEOVERS BULLETIN NO. 30

The latest issue of the SFC's Takeovers Bulletin<sup>1</sup> (the **Bulletin**) published on 30 September:

- clarifies that where an offer is unconditional from the outset, associates who are not concert parties of the offeror need only disclose dealings taking place from the offer period commencement date to the date of dispatch of the offer document or composite document;
- reminds listed companies that all announcements and documents not on the SFC's Post-Vet list must be submitted to the SFC for comment before publication. The pre-vetting requirement applies to announcements and other documents relating to transactions stated to be conditional on no general offer obligation arising under the Codes and offers for which a ruling is sought that no such obligation arises;
- recommends that in placing and top-up transactions, a placing shareholder who (together with his concert parties) has held more than 50% of a company's voting rights for the 12 months before the placing, should include a confirmation to that effect either in the announcement of the transaction, or in a separate written confirmation to the SFC immediately after the publication of the announcement; and
- reminds issuers that for urgent matters requiring immediate attention, relevant case officers or the general Takeovers Hotline should be called.

### **Associates' Dealing Disclosure Obligations in Unconditional Offers**

#### ***Rule 22: The Disclosure Obligation***

Parties to an offer and their respective associates are required to disclose dealings in relevant securities of the offeree company and, in the case of a securities exchange offer, in relevant securities of the offeror company, conducted either on their own account or on behalf of discretionary clients (Rule 22 of the Codes on Takeovers and Mergers and Share Buy-backs (the **Codes**)).

The Codes define "associates" broadly<sup>2</sup> and these include any person who owns or controls 5% or more of any class of relevant securities. Fund managers with holdings of 5% or more of Hong Kong listed companies have been reminded of their disclosure obligations under the Codes by the SFC on a number of occasions. Fund managers should follow the SFC's "Guidelines to fund managers on dealing disclosure obligations under Rule 22 of the Code on Takeovers and Mergers"<sup>3</sup> (the **Guidelines**) published in December 2011. Fund managers should, in particular, heed the SFC's advice that they regularly review the Offer Period Tables on the SFC website ([www.sfc.hk](http://www.sfc.hk)) for details of current offer periods under the Codes. These are available on the SFC website under 'Regulatory Functions' – 'Listings & takeovers' – 'Takeovers & Mergers' – 'Offer period tables' and the current version can be seen at <http://www.sfc.hk/web/EN/regulatory-functions/listings-and-takeovers/takeovers-and-mergers/offer-period-tables.html>. However, the Guidelines warn against relying on the offer period tables as the sole source of information and suggest additionally monitoring companies which have started

an offer period by monitoring HKExnews at [www.hkex.com.hk](http://www.hkex.com.hk) to see company announcements relating to takeover offers; subscribing to the News Alerts service on the HKEx website; and monitoring financial media.

Since 1 July 2014, all dealing disclosures under Rule 22 must be made by electronic submission of dealing disclosure forms via the link <https://www.sfc.hk/dealdisclosure/gateway/landing?locale=en>. The deadline for submission is 10.00 am on the business day following the date of the transaction, although where dealings take place on stock exchanges in the United States, the Executive allows an additional business day for disclosure of dealings making the submission deadline no later than 10.00 am on the second business day after the date of the transaction.<sup>4</sup>

### **Note 3 to Rule 22 and application to Unconditional Offers**

Note 3 to Rule 22 provides that:

*“[t]his Rule 22 applies only during an offer period. Dealings by associates (other than persons acting in concert) 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.”*

The Bulletin clarifies that in the case of offers that are unconditional from the outset, associates are only required to disclose dealings that take place from the commencement date of the offer period to the date of dispatch of the offer document or composite document, provided that such associates are not concert parties of an offeror. The rationale is that once an offer is unconditional in all respects, dealings by parties who are not closely connected with the offeror are unlikely to be relevant information for minority shareholders to assess the merits of any offer. Disclosure is therefore considered unnecessary.

### **Reminder to Submit Code Documents for Publication before Release or Publication**

#### **Pre-vetting Requirement**

With the exception of documents on the SFC's Post-Vet List<sup>5</sup>, all Code-related announcements and documents are required by Rule 12.1 of the Codes to be filed with the Executive for comment before release or publication. They should not therefore be released or published until the Executive has confirmed that it has no further comments.

“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. The definition 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.

The SFC states in the Bulletin that there have been a number of recent instances of issuers failing to submit draft announcements to the Executive for comment prior to their release and of non-compliance with the Codes' disclosure requirements such as inclusion of the required directors' responsibility statement under Rule 9.3 of the Codes. The SFC is particularly concerned about announcements of transactions that are stated to be conditional upon no general offer obligation arising under the Codes. In appropriate circumstances, the SFC has required the publication of clarification announcements.

The Bulletin includes a reminder that, at the start of a transaction, issuers and their advisers should consider whether an announcement is a document which requires pre-vetting by the SFC in accordance with Rule 12.1. 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 Codes, the announcement will fall under paragraph (2) of the definition of “document” and must be filed with the Executive for comment before publication.

#### **Documents subject to post-vetting**

Documents on the SFC's Post-Vet list do not need to be submitted for comments before publication. Instead, the published version of the document which qualifies for post-vetting must be filed with the Executive immediately after publication of the document. The Post-Vet list is updated from time to time and currently includes:

- announcements of the appointment of independent financial advisers under Rule 2.1,

- announcements of the dispatch of circulars under Rule 8 or Rule 25,
- announcements of delay in the dispatch of circulars under Rule 8.2 or Rule 8.4,
- announcements of the appointment and resignation of directors of the offeree company under Rule 26.4 and Rule 7,
- announcements of placing and top-up transactions under Note 6 on dispensations from Rule 26,
- announcements of numbers of relevant securities in issue under Rule 3.8, and
- announcements of final completion of issue of new securities for whitewash transactions under paragraph 6 of Schedule VI.

Listed companies must also be aware that all documents issued under the Codes must include a responsibility statement as required by Rule 9.3 of the Takeovers Code.<sup>6</sup>

For further guidance on post-vetting of documents, please refer to Practice Note 5.<sup>7</sup>

### Confirmation of Past Shareholdings in Placing and Top-up Transactions

Note 6 on dispensations from Rule 26 provides that a waiver will normally be granted from the Rule 26 mandatory general offer obligation where a shareholder who (together with persons acting in concert with him) holds 50% or less of a company's voting rights and places part of his holding to an independent person(s), provided that he subscribes for new shares up to the number placed at a price substantially equivalent to the placing price (after taking account of expenses incurred in the transaction). The subscription for new shares should occur as soon as is practicable after the placing.

Note 6 further provides that where a placing shareholder (together with persons acting in concert with him) has continuously held more than 50% of a company's voting rights for at least 12 months immediately preceding the relevant placing and top-up, a waiver is not 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.

The Bulletin recommends that in order to be clear that the transaction will not require a waiver under Note 6, listed companies should include a confirmation in the relevant announcement that the placing shareholder and his concert parties have continuously held more than 50% of the company's voting rights in the 12 months immediately preceding the placing and top-up transaction. If this disclosure is not made in the announcement, a separate written confirmation to such effect should be provided to the SFC immediately following the publication of the relevant announcement.

### Communication with the Executive/SFC

The bulletin confirms the SFC's commitment to responding to fax and email communications as soon as possible. For urgent matters requiring immediate attention (particularly for matters needing attention over lunch time), however, it is recommended that listed companies and their advisers should contact the relevant case officer by phone or alternatively the general Takeovers Hotline on 2231 1210.

1. [http://www.sfc.hk/web/EN/files/CF/pdf/Takeovers Bulletin/Takeovers Bulletin\\_30\\_20140930\\_Eng.pdf](http://www.sfc.hk/web/EN/files/CF/pdf/Takeovers%20Bulletin/Takeovers%20Bulletin_30_20140930_Eng.pdf)
2. The definition of "associate" provides that "It is not practicable to define associates in terms that would cover all the different relationships which may exist in an offer. The term associate will cover all persons acting in concert with an offeror. It is also intended to apply to a wider range of persons (who may not be acting in concert) and will cover all persons who directly or indirectly own or deal in the relevant securities of an offeror or the offeree company in an offer and who have (in addition to their normal interests as shareholders) an interest or potential interest, whether commercial, financial or personal, in the outcome of the offer. Without prejudice to the generality of the foregoing, the term associate normally includes the following:
  - 1) an offeror's or the offeree company's parent, subsidiaries and fellow subsidiaries, and their associated companies, and companies of which such companies are associated companies;
  - 2) any bank and financial and other professional adviser (including a stockbroker) to an offeror, the offeree company or any company in class (1), including persons controlling, controlled by or under the same control as such banks, financial and other professional advisers;
  - 3) the directors (together with their close relatives, related trusts and companies controlled by any of the directors, their close relatives or related trusts) of an offeror, the offeree company or any company in class (1);
  - 4) the pension funds, provident funds and employee share schemes of an offeror, the offeree company or any company in class (1);
  - 5) any investment company, unit trust or other person whose investments an associate manages on a discretionary basis, in

respect of the relevant investment accounts;

- 6) a person who owns or controls 5% or more of any class of relevant securities (as defined in paragraphs (a) and (b) in Note 4 to Rule 22) issued by an offeror or the offeree company, including a person who as a result of any transaction owns or controls 5% or more. When two or more persons act pursuant to an agreement or understanding (formal or informal) to acquire or control such securities, they will be deemed a single person for the purpose of this paragraph. Such securities managed on a discretionary basis by an investment management group will, unless otherwise agreed by the Executive, also be deemed to be those of a single person; and
  - 7) a company having a material trading arrangement with an offeror or the offeree company.”
3. [http://en-rules.sfc.hk/net\\_file\\_store/new\\_rulebooks/h/k/HKSFC3527\\_3638\\_VER20.pdf](http://en-rules.sfc.hk/net_file_store/new_rulebooks/h/k/HKSFC3527_3638_VER20.pdf)
  4. SFC Takeovers Bulletin Issue No. 29 of June 14 at page 3.
  5. <http://www.sfc.hk/web/EN/regulatory-functions/listings-and-takeovers/takeovers-and-mergers/post-vet-list.html>
  6. [http://en-rules.sfc.hk/en/display/display\\_main.html?rbid=3527&element\\_id=1631](http://en-rules.sfc.hk/en/display/display_main.html?rbid=3527&element_id=1631)
  7. [http://www.sfc.hk/web/EN/files/CF/pdf/Practice\\_Notes/Practice\\_Note\\_05\\_EN\\_3\\_March\\_2014.pdf](http://www.sfc.hk/web/EN/files/CF/pdf/Practice_Notes/Practice_Note_05_EN_3_March_2014.pdf)

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**Hong Kong Office**

Dominion Centre

12th Floor

43-59 Queen's Road East

Hong Kong

**Tel:** + (852) 2905 7888

**Fax:** + (852) 2854 9596

[www.charltonslaw.com](http://www.charltonslaw.com)