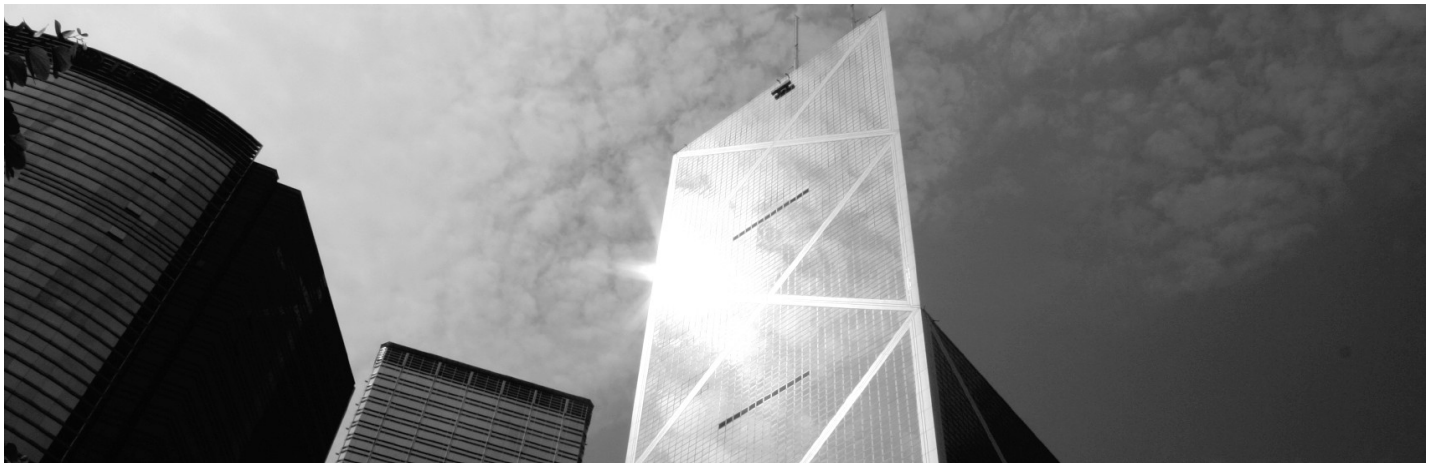
CHARLTONS
SOLICITORS



Hong Kong **July** 2016

SFC Takeovers Bulletin No. 37 on Takeovers Code Breaches and Regulatory Reminders

The Securities and Futures Commission published Takeovers Bulletin No. 37 in June 2016. The bulletin covers recent disciplinary actions for breaches of the following Takeovers Code provisions: the special deal requirements under Rule 25, the prohibition on offers above the offer price within 6 months of the close of an offer under Rule 31 and the disclosure obligations under Rule 22.

The bulletin also provides guidance on:

- the limited circumstances in which it is appropriate to issue a "talks" announcement under Rule 3.7;
- the engagement of financial advisers on Code-related transactions; and
- the need to ensure compliance with applicable Listing Rules' requirements in the context of a whitewash transaction.

SFC Disciplinary Actions

The SFC took a number of disciplinary actions against a number of companies this quarter, including Alibaba Group Holdings Limited, China New Way Investment Limited, Bank of America, National Association and Merrill Lynch International.

Takeovers Panel rules that Alibaba breached the special deal provisions under Rule 25 of the Takeovers Code

The Takeovers Panel ruled that Alibaba Group Holdings Limited (**Alibaba**) breached Rule 25 of the Takeovers Code when it offered to purchase Hebei Huiyan Medical Technology Co. Ltd. (**Hebei Huiyan**) from Mr. Chen Wen Xin, who was a shareholder of CITIC 21CN Company Limited (**CITIC 21CN**), which Alibaba was also trying to acquire at the same time. The offer to purchase Hebei Huiyan constituted a "special deal" under Rule 25, which was not extended to all shareholders of CITIC 21CN.

Consequently, the whitewash waiver that was granted to Alibaba was invalidated and a mandatory general offer obligation was triggered. However, the Takeovers Panel was unable to arrive at a precise value for the favourable conditions received by Mr. Chen Wen Xin, and could not decide on a reasonable offer price. Therefore, the Takeovers Panel decided to waive Alibaba's mandatory general offer obligation.

Charltons had published a detailed newsletter on the Takeovers Panel's ruling previously.

China New Way criticised for breach of Rule 31.3 of the Takeovers Code

The SFC criticised China New Way Investment Limited (**China New Way**) and five individuals for breaching Rule 31.3 of the Takeovers Code by acquiring shares in China City Construction Group Holdings Limited within six months after an offer at a price higher than the offer price. The five individuals include China New Way's sole director and the four beneficial owners of China New Way's holding company. The criticised parties stated that the prohibited series of share acquisitions were not intended to breach any provision of the Takeovers Code, but have apologised and accepted the SFC's disciplinary action.

Public censure of two Bank of America Merrill Lynch units for breaches of Rule 22 of the Takeovers Code

Bank of America, National Association (**BANA**) and Merrill Lynch International (**MLI**) were publicly censured for failing to disclose dealings in the relevant securities of offeree companies (of whom BANA and MLI were associates under the Takeovers Code), which were conducted during their respective offer periods. BANA, MLI and Merrill Lynch (Asia Pacific) Limited (**MLAP**) are all part of the Bank of America Merrill Lynch Group.

The definition of "associate" under the Takeovers Code includes "any bank and financial and other professional adviser … to an offeror [or] the offeree company … including persons controlling, controlled by or under the same control as such banks, financial and other professional advisers".

MLAP acted as the financial adviser to the offeror, CRH (Enterprise) Limited, in respect of a possible partial offer for China Resources Beer (Holdings) Company Limited (**CRB**). During the offer period, BANA entered into 198 cash-settled equity swaps in respect of CRB shares, of which MLI were party to 45, but neither party filed disclosures for any of these transactions.

MLAP acted as the financial adviser to the offeree, Power Assets Holdings Limited (**Power Assets**) on its privatisation by Cheung Kong Infrastructure Holdings Limited (**CKI**). During the offer period, BANA entered into a number of cash-settled equity swaps in respect of CKI shares (36) and Power Assets (12). For each of these swaps, BANA and MLI entered into a corresponding swap. BANA failed to file disclosures for 19 swaps for CKI shares and 7 swaps for Power Assets shares. MLI failed to disclose 14 swaps for CKI shares and 1 swap for Power Assets shares.

The Bank of America Merrill Lynch Group apologised for the non-disclosures of BANA and MLI and implemented a number of remedial measures, including a review of its compliance procedures and manuals.

Reminders on Regulatory Matters

Takeovers Bulletin No. 37 included several reminders on Rule 3.7 announcements, the engagement of financial advisers and the requirement to comply with rules and regulations in order to obtain whitewash waivers from mandatory offers.

"Talks" announcements should not be issued for convenience

Commenting on the recent increase in the number of "talks" announcements issued under Rule 3.7 of the Takeovers Code, the SFC noted that these announcements typically affect the market price of the offeree company's shares notwithstanding the inclusion of warnings in the announcement that an offer is only a possibility and may not materialise. For that reason, talks announcements should not be issued as a matter of convenience.

A "talks" announcement is needed only when the offer is the subject of rumour or speculation or there is undue movement in the offeree's share price or volume of turnover giving rise to an obligation to issue an announcement under Rule 3.1, 3.2 or 3.3, but there is not yet a firm intention to make an offer because the parties are still negotiating.

In most cases, there should be no need to publish a talks announcement while the parties are negotiating a possible offer provided that confidentiality is maintained as required by Rule 1.4. If confidentiality is maintained prior to the announcement of a firm intention to make an offer under Rule 3.5, circumstances which would trigger an obligation to publish an announcement under the other provisions of Rule 3 should not arise. This should also be the case where the offeree company's board has been approached about, or informed of, a possible offer (including a possible privatisation proposal) which is under consideration or negotiation. The parties to a possible takeover should therefore consider whether a Rule 3.7 announcement is in fact required before issuing one.

Where there is an obligation to publish a Rule 3.7 announcement, it should be fairly short and should only disclose the fact that talks are taking place. It is not normally acceptable to include information as to the indicative offer price or the form of consideration in a Rule 3.7 announcement. This is because the parties are required to keep this information confidential until the announcement of a firm intention to make an offer. The parties should thus take all necessary steps to prevent information about the offer being leaked before the Rule 3.5 announcement.

Parties to possible offers are also reminded to avoid unnecessary trading suspensions whenever possible. The SFC reiterates that trading suspensions to allow negotiations to take place are not acceptable. If trading in the shares of the offeree company is suspended, an announcement should be published as soon as possible to allow trading to resume without delay. In exceptional circumstances where

it is necessary for trading to be suspended for an extended period of time, a holding announcement should be published explaining the reasons for the delay in resuming trading.

Reminder to engage competent financial advisers

The Takeovers Bulletin notes the importance of both the offeree and offeror companies engaging a financial adviser on transactions involving the issue of an offer document, offeree board circular, whitewash document, share buy-back offer document or off-market share buy-back circular. Financial advisers should have the competence, professional expertise and adequate resources to discharge their responsibilities under the Codes.

Financial advisers are commonly engaged at an early stage in Code-related transactions. The Corporate Finance Adviser Code of Conduct encourages financial advisers to record the terms of their client engagements in writing. For the purposes of the Code, the SFC considers that a financial advisory relationship arises as soon as the adviser starts working with the client, whether or not an engagement letter has been entered into.

Non-compliance with rules and regulations may result in refusal of whitewash waiver

An application for a whitewash waiver in respect of a mandatory offer under Note 1 to Rule 26 of the Takeovers Code may be denied if the issuer fails to comply with applicable rules and regulations such as the Listing Rules of the Stock Exchange of Hong Kong (the **Exchange**). In particular, parties should comply with the Listing Rules' requirements on the issue of securities, public float and, where the issue of new securities involves a cash subscription and/or relates to a material asset acquisition, the requirements on cash companies and/or reverse takeovers.

Where there are concerns about compliance with other applicable rules and regulations in the context of a whitewash transaction, the parties and their advisers should consult the relevant regulatory authority as soon as possible. The Executive should also be informed of relevant matters.

All Rule 3.5 announcements relating to a whitewash waiver should include the following statement:

> *"As at the date of this announcement, the [Company] does not believe that the [proposed transaction(s)] gives rise to any concerns in relation to compliance with other applicable rules or regulations (including the Listing Rules). If a concern should arise after the release of this announcement, the Company will endeavour to resolve the matter to the satisfaction of the relevant authority as soon as possible but in any event before the despatch of the whitewash circular. The Company notes that the Executive may not grant the whitewash waiver if the [proposed transaction(s)] does not comply with other applicable rules and regulations."*

Fourth Asia Pacific Takeovers Regulators Conference

The SFC hosted the fourth Asia Pacific Takeovers Regulators Conference in May this year. Over 20 takeovers regulators discussed topics such as shareholders' activism, crowd-funding, special deals and waivers from mandatory offers.

CHARLTONS

Best Boutique Firm 2015
Asian Legal Business Awards

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